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Supreme Court, U.S.
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In The Supreme Court of the United States

JEANNE E. CALDWELL,

Petitioner,

v.

ROY L. CALDWELL, PH.D., in his official capacity as Director of the University Of California Museum Of Paleontology; DAVID LINDBERG, in his official capacity as Chair of the Integrative Biology Department of the University of California-Berkeley; and MICHAEL D. PIBURN, in his official capacity as Program Director for the National Science Foundation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

KEVIN T. SNIDER
Counsel of Record
MATTHEW B. MCREYNOLDS
PACIFIC JUSTICE INSTITUTE
Post Office Box 276600
9851 Horn Road, Suite 115
Sacramento, California 95827
(916) 857-6900 (Telephone)
(916) 857-6902 (Facsimile)

LARRY J. CALDWELL
CALDWELL LAW FIRM
1380 Lead Hill Blvd, Suite 106
Roseville, California 95661
(916) 677-4254 (Telephone)
(916) 671-8322 (Facsimile)

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Jeanne Caldwell, a California resident, is the mother of three children who study science in public school, and is herself an active participant in public debates on science education. California authors a website whose ostensible purpose is to educate the public on science. Caldwell uses the website for that purpose. The website proclaims California's religious position on a theological debate within Christianity, and describes Caldwell's religious position as "divisive" and "incorrect." California's website is endorsed by the United States. Does Caldwell have standing to bring an Establishment Clause claim, or are government websites immune from Establishment Clause claims?

PARTIES TO THE PROCEEDINGS

Petitioner Jeanne E. Caldwell was the plaintiff-appellant in the court below. Respondents Roy L. Caldwell, in his official capacity as Director of the University Of California Museum Of Paleontology; David Lindberg, in his official capacity as Chair of the Integrative Biology Department of the University of California-Berkeley; and Michael D. Piburn, in his official capacity as Program Director for the National Science Foundation were the defendants-appellees below. There are no other parties.

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OPINIONS BELOW

The opinion of the district court is reported at 420 F. Supp. 2d 1102 (N.D. Cal. 2006). (App. 18) The Ninth Circuit's opinion affirming the decision of the district court is reported at 545 F.3d 1126. (App. 1) Both opinions are published.

JURISDICTION

The opinion of the Court of Appeals (App. 1) was filed on October 3, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant portion of section 2 of Article III provides:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States. . . ."

The First Amendment states in pertinent part as follows:

> "Congress shall make no law respecting an establishment of religion. . . ."

42 U.S.C. § 1983 states in part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage,

> of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

STATEMENT OF THE CASE

Jeanne Caldwell filed a complaint which challenges a section of a website published by the University of California entitled *Understanding Evolution*.[1] The section in question involves a dispute within the faith community relative to origins. This debate revolves around whether the account of creation in Genesis is to be interpreted in a figurative or a literal manner. A condensed and simplified view of the competing ideas is as follows: those who believe in a literal version of the Bible generally assert that the biblical account of life's origins is incompatible with Darwin's theory of evolution; those who interpret the Bible in a literary manner (e.g., allegorically) find the creation story in Genesis compatible with Darwin's theory of evolution. The underlying religious debate informs positions in the public policy debate over evolution education. Jeanne Caldwell reads the Bible

[1] http://evolution.berkeley.edu

literally. The state operated website has described the dispute and has identified itself with the opposing theological position. Because persons acting under color of law have taken sides in what is essentially a dispute within the faith community, a cause of action for a violation of the Establishment Clause has been alleged in the complaint.

The complaint alleges the following. The University of California is an agency of the State of California. The National Science Foundation is an agency of the United States of America. The National Center for Science Education is a religious advocacy organization. The University of California joined the National Center for Science Education, a religious advocacy organization, in applying to the National Science Foundation for a grant to create an internet website on evolution aimed at combating "[t]he influence of a minority of vocal Christian fundamentalists" in the religious debate over evolution education.

After a peer-review process, the National Science Foundation awarded a grant to the University of California which, to date, has provided over $530,000 in federal funding to the University of California for the development of the proposed internet website. The grant application acknowledges that "[e]volution is the most controversial subject in science, and has been so in American public education since the 1920s."

Pursuant to the grant, the University of California, in conjunction with the National Center for

Science Education, created an internet website called *Understanding Evolution*, which includes a statement informing its users that the website was created pursuant to a grant from the National Science Foundation. Initially, *Understanding Evolution* was aimed primarily at K-12 school teachers (although it was always accessible by the public). However, in 2005 (before the commencement of this lawsuit), *Understanding Evolution* was remodeled and has since been promoted to the general public by the University of California as "Your One-Stop Source for Information on Evolution."

In furtherance of the University of California's primary goal of combating "a minority of vocal Christian fundamentalists," *Understanding Evolution* includes a webpage stating the University of California's official position in the religious debate over the compatibility of Darwin's theory of evolution with the biblical account of origins. The title of the webpage proclaims the University of California's stance in this religious debate: *Misconception: "Evolution and Religion Are Incompatible."* When the complaint was filed, the *Evolution and Religion Are Incompatible* webpage stated:

> ***"Misconception: 'Evolution and Religion Are Incompatible'***
>
> **"Response:**
>
> "Religion and science (evolution) are very different things. In science (as in science class),

only natural causes are used to explain natural phenomena, while religion deals with beliefs that are beyond the natural world.

"The misconception that one always has to choose between science and religion is divisive. Most Christian and Jewish religious groups have no conflict with the theory of evolution or other scientific findings. In fact, many religious people, including theologians, feel that a deeper understanding of nature actually enriches their faith. Moreover, in the scientific community there are thousands of scientists who are devoutly religious and also accept evolution."[2]

In response to this lawsuit, the text of the *Evolution and Religion Are Incompatible* webpage was revised to read:

"***Misconception: 'Evolution and Religion Are Incompatible'***

"Response:

"Religion and science (evolution) are very different things. In science, only natural causes are used to explain natural phenomena, while religion deals with beliefs that are beyond the natural world.

"The misconception that one always has to choose between science and religion is incorrect. Of course, some religious beliefs explicitly

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[2] Exhibit 2 of the Complaint (App. 4).

> contradict science (e.g., the belief that the world and all life on it was created in six literal days); however, most religious groups have no conflict with the theory of evolution or other scientific findings. In fact, many religious people, including theologians, feel that a deeper understanding of nature actually enriches their faith. Moreover, in the scientific community there are thousands of scientists who are devoutly religious and also accept evolution."[3]

The *Misconception: Evolution and Religion Are Incompatible* webpage communicates an undeniably religious message that is reinforced visually by a cartoon drawing of a robe-clad cleric holding a Bible engraved with a Latin cross shaking hands with a scientist holding a fossil, both of whom are smiling.[4] The *Misconception: Evolution and Religion Are Incompatible* webpage also contains a jump-site link to a webpage on the National Center for Science Education website entitled *Voices for Evolution*,[5] containing doctrinal statements by Christian denominations and other religious organizations that accept the canon that the biblical account of origins is compatible with Darwin's evolutionary account of origins. The religious doctrines, provided by the jump-cite, all fall on the government's chosen side of this quintessentially

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[3] http://evolution.berkeley.edu/evosite/misconceps/IVAandreligion.shtml

[4] Exhibit 2 of the Complaint (App. 4).

[5] *Id.*

religious debate on origins. For purposes of this litigation, Jeanne Caldwell contends that both the revised and original versions of the *Misconception: Evolution and Religion Are Incompatible* webpage violate the Establishment Clause, in the context of the University of California's stated purpose of creating a website to combat the "minority of vocal Christian fundamentalists" in the religious debate over evolution education.

Jeanne Caldwell, who lives in Roseville, California, approximately 90 miles from the University of California's Museum of Paleontology, in Berkeley, California, is the mother of three children who attend public school in California. She is an active participant in the religious debate over whether the biblical account of origins is compatible with Darwin's evolutionary account of origins, and in the accompanying public debate over how Darwin's evolutionary account of origins should be taught in our public schools. Caldwell, a biblical literalist, believes that the biblical account of origins is incompatible with Darwin's evolutionary account of origins. Consistent with her religious belief, Caldwell is of the opinion that children in the public schools should not be taught that the Christian account of origins is compatible with Darwin's evolutionary account of evolution. Rather, she holds the opinion that the State of California and the United States should remain neutral on the religious question of whether the biblical account of origins is compatible with Darwin's account of evolution.

Caldwell uses *Understanding Evolution* for its intended purpose of being a "One-Stop Source for Information on Evolution." One of her motivations for using *Understanding Evolution* is so that she will be an informed participant in the public debate over how evolution ought to be taught in her local public schools. But Caldwell cannot use the entire *Understanding Evolution* website without reading the University of California's doctrinal statement on the religious question of whether the biblical account of origins is compatible with Darwin's evolutionary account of origins. Caldwell finds the University of California's statement of this religious doctrine on *Understanding Evolution* deeply offensive, since it conflicts with her own religious beliefs on this question. Caldwell is made to feel like an outsider by the pejorative statement in the original edition of the *Misconception: Evolution and Religion Are Incompatible* webpage that her religious belief is considered "divisive," and therefore disfavored, by the State of California. Caldwell is equally offended and made to feel like an outsider by the State of California's statement on the revised edition of the *Misconception: Evolution and Religion Are Incompatible* webpage that her belief that the biblical account of evolution is incompatible with Darwin's account of evolution is "incorrect." Also troubling to her, as a reasonable observer with knowledge of the history of *Understanding Evolution* and the National Science Foundation grant approval process, is Caldwell's discovery that the primary purpose of the entire *Understanding Evolution* website was to combat the "influence of . . .

Christian fundamentalists" such as herself in the religious and public policy debates over how Darwin's evolutionary account of evolution should be taught in her childrens' public schools. Caldwell is also troubled that the United States, acting under the auspices of the National Science Foundation, endorses *Understanding Evolution*, with knowledge, and allegedly rigorous peer review, of its religious content and purpose.

Because Caldwell cannot use the entire website unreservedly, she filed suit in federal court pursuant to 42 U.S.C. § 1983 for violation of the Establishment Clause. The District Court dismissed the complaint without leave to amend based on a lack of Article III standing and the Court of Appeals for the Ninth Circuit affirmed. Caldwell has timely filed this Petition.

SUMMARY OF THE ARGUMENT

Increasingly, governments communicate with their citizens through websites on the internet. Such government websites are rapidly replacing older forms of communications such as books, pamphlets, postal letters, radio broadcasts, television telecasts, and in-person conversations as the primary means used by state governments and the federal government to communicate with their citizens. It is to be expected that this migration of governmental communications is being accompanied by a corresponding

migration of Constitutional violations from traditional locations to websites.

Thus far, jurisprudence has not kept up with technology. There is currently no guidance from this court as to how Article III and prudential standing rules apply to Establishment Clause violations on government websites. This case is a prime example of the new era of Establishment Clause claims and the urgent need for such guidance.

Understanding Evolution is an internet website owned, authored and published by the University of California, with a statement of endorsement by the National Science Foundation. Promoted to the public as "Your One-Stop Source for Information on Evolution," *Understanding Evolution* contains a webpage entitled *Evolution and Religion Are Incompatible* which states the University of California's position on the religious debate over whether the biblical account of origins is compatible with Darwin's evolutionary account of origins. The webpage is illustrated by a drawing of a robe-clad cleric holding a Bible with a Latin cross on the cover shaking hands with a scientist holding a fossil.

The Petitioner, Jeanne E. Caldwell, is a Christian and mother of three school-aged children who believes in a literal interpretation of the Bible, and also believes that the Bible's account of origins by supernatural creation is incompatible with Charles Darwin's evolutionary account of origins by natural selection. Caldwell uses *Understanding Evolution* for

its intended purpose to educate herself about evolution. While using *Understanding Evolution*, Jeanne Caldwell encounters the *Evolution and Religion Are Incompatible* webpage. The original edition of the *Evolution and Religion Are Incompatible* webpage labeled Caldwell's belief about this religious question as "divisive," while a revised edition of the *Evolution and Religion Are Incompatible* webpage labels Caldwell's religious belief as "incorrect." Caldwell is offended by the University of California's proclamation of a religious doctrine on evolution that is contrary to her own religious belief, on a public website publicly endorsed by the federal governemant. And the State of California's denouncement of her religious belief as "divisive" and "incorrect" makes Caldwell feel like a political outsider.

Caldwell respectfully submits that she has alleged sufficient injury in fact to constitute Article III and prudential standing to pursue her Establishment Clause claim against the University of California and the National Science Foundation.

However, the Ninth Circuit affirmed the district court's dismissal of Caldwell's lawsuit on the grounds of lack of standing. The Ninth Circuit, the only appellate court to rule on this issue, has adopted an antiquated standing rule that ignores the reality that a citizen's viewing of an offending governmental religious message on a computer screen in her home is an equally direct and physical interaction with the message as a citizen viewing a Latin cross in a government park. The Ninth Circuit reasoned that

Caldwell lacks standing because (1) the religious statements on the website are not sufficiently *permanent*, and (2) Caldwell has not demonstrated a sufficient *connection* to the website. The first part of the Ninth Circuit's standing rule for constitutional violations on government websites, based on their changeable nature, would render all government websites immune from legal challenge by citizens. Moreover, this case also shows how unworkable a *permanence* element is, since the governmental religious message in this case has already been present on the *Understanding Evolution* website for three years. If three years is not sufficiently *permanent* for standing purposes, what length of time would be? As a corollary, would this mean that a citizen who observes a violation of the Establishment Clause in any setting must wait a number of years while the violation achieves *permanence* before she will be granted standing to challenge the violation in court?

The second part of the Ninth Circuit's standing rule for constitutional violations on government websites embroils courts in the inherently arbitrary task of making a qualitative comparison of various citizens' reasons for visiting and using a governmental resource for its intended purpose. This case proves the arbitrariness of such a test. The Ninth Circuit has divined that a resident mother of three children who, from her home computer, uses a website produced by her state, for its intended purpose of teaching citizens about science, does not have a sufficient interest to confer standing. In contrast, the Ninth Circuit's

opinion asserts that this parent's interest is not equal to that of a non-resident retired federal employee, visiting a federal preserve in another state, who was found to have standing to challenge a cross located in a remote section of the preserve.

The Petition should be granted so that this Court can provide direction and articulate a workable test for how the traditional standing rules apply to Establishment Clause claims arising from violations that occur on government websites.

ARGUMENT

There are three reasons that review should be granted as follows:

1. This is a case of first impression.
2. Cases that implicate the Establishment Clause on government owned websites will occur in the future.
3. Formulation of a test is in the public interest.

A. This is a case of first impression.

1. A growing body of cases involves claims arising from conduct on internet websites.

Increasingly, websites are replacing buildings as the place where citizens interact with their governments.

State-run websites disseminate notices, informational pamphlets and governmental messages the way that print publications, mail service and in-person communications once did. As local, state and federal agencies routinely produce and maintain websites intended for public use, there can be no reasonable expectation of immunity from liability. Although most cases do not have state actors as parties, according to the *Internet Library of Law and Court Decisions*, there are 590 reported cases that involve internet liability in the federal courts.[6]

2. None of the growing body of cases involves a citizen claim for an Establishment Clause violation on a website.

It is to be expected that, as there is a shift from physical government offices to the internet, an inevitable corresponding rise in requests for intervention from the courts to address constitutional claims will result. Although there is a growing docket of cases involving the internet, none other than the lower court decisions in this case have as of yet addressed Article III standing in the context of the Establishment Clause. This case merits review because it presents the threshold issue of Article III and prudential standing for a citizen to pursue a court claim when an Establishment Clause violation occurs on a

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[6] http://www.internetlibrary.com (last visited November 19, 2008)

government website, rather than in a government office, park, or more traditional form of communication.

B. The issue in this case will be repeated.

The Petition should be granted because this issue will continue to be repeated in the courts. A variety of circumstances will raise colorable claims of violations of the Establishment Clause. For example, thousands of religious items are located in local, state, and federal buildings and parks throughout the country. H.R. Res. 888, 110th Cong. (Jan. 23, 2008). Many are currently featured on government websites. By way of example, the Colonial National Historical Park has a section with a Latin Cross called Cape Henry Memorial Cross. Photographs of the cross are displayed on the National Park Service website.[7] Indeed, approximately seventy displays of the Ten Commandments adorn parks throughout the country, in addition to scores of Decalogue displays in courthouses.[8] The Goddess of Justice also stands watch over hundreds of courthouses.[9] Not surprisingly, photographs of these religious displays are routinely posted on government websites.

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[7] http://www.nps.gov/came/

[8] http://www.atheistactivist.org/Decalogues.html

[9] http://www.members.tripod.com/mdean/justice.html

Allowing the Ninth Circuit's decision to stand without review would make government websites an Establishment Clause free zone. Such a rule represents a radical departure from the standing rules and underlying policies that apply to all government resources other than websites.

A couple of examples will bring the imprudence of such a rule into focus. Hypothetically, a courthouse could display the Decalogue on its webpage – with an express religious purpose in doing so – though it may have been enjoined from having such a display on the wall. Would the memorial cross cases[10] become moot if the crosses were physically removed from the park itself but virtually erected on the park website instead? Put simply, is there a real property requirement to have standing to bring an Establishment Clause challenge? Absent resolution of that issue, this type of case will be repeated.

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[10] For example, *Buono v. Norton*, 371 F.3d 543 (9th Cir. 1994); *Separation of Church and State v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996); *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993); *ACLU of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986); and *ACLU of Georgia v. Rabun County*, 698 F.2d 1098 (11th Cir. 1983).

C. Formulation of a test is in the public interest.

1. There has been no clear judicial statement of how the test for Article III standing applies to a government website.

Beyond the facts of this case, the question of whether citizens have standing to challenge an Establishment Clause violation on a website is an important public issue that needs resolution. More than a quarter century ago, the *Valley Forge* court did not contemplate a society in which much – perhaps even most – interaction between the government and its citizens occurs in a virtual world. It is in the public interest for this Court to develop a workable test which avoids the two extremes in which either the whole world has standing or no one has standing. Granting this Petition will provide such a test.

The fundamental elements of Article III standing are well-established. A party has Article III standing if she suffers an "injury in fact," the injury is fairly traceable to the challenged conduct, and the injury is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). In the Establishment Clause context, this Court found no Article III standing in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) because plaintiffs: (1) never visited the government property in question, (2) merely read about the land transfer in a news release, and (3) had only a generalized grievance similar to all taxpayers. *Valley Forge*, 454 U.S.

464, 469 (1982). Plaintiffs in *Valley Forge* never used the government resource in question and never came into direct contact with a religious message by one acting under color of law while using that government resource. *Id.* In *Valley Forge*, the governmental action being challenged was not the communication of a religious message by the state on government property; it was the transfer of ownership in that governmental property. This Court has never announced what standing rules apply when the governmental action being challenged as violative of the Establishment Clause is the government's communication of a religious message on government-owned property.

A line of cases from the Ninth Circuit has attempted to apply *Valley Forge* to Establishment Clause cases challenging Latin crosses on government-owned property. In those cases, the Ninth Circuit has found that a plaintiff can allege sufficient "injury in fact" to confer standing to pursue an Establishment Clause claim if he comes into direct contact with a religious symbol such as a Latin cross, on land owned by the government, communicating a religious message that he finds offensive. *Buono v. Norton*, 371 F.3d 543 (9th Cir. 1994); *Separation of Church and State v. City of Eugene*, 93 F.3d 617, 619, fn. 2 (9th Cir. 1996); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993); *Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir. 1991), *cert. denied*, 502 U.S. 1073, 112 S.Ct. 969, 117 L.Ed.2d 134 (1992). The *Ellis* court encapsulates the reasoning when it states: "We . . . follow[ ] other circuits in holding that 'when a plaintiff alleges

that the government has unconstitutionally aligned itself with religion, standing may be based on finding that the plaintiff has been injured due to his or her not being able to freely use public areas.'" *Ellis*, 990 F.2d at 1523 (citing *Hewitt*, 940 F.2d at 1564 citing *ACLU of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986), *cert. denied*, 479 U.S. 961, 107 S.Ct. 458, 93 L.Ed.2d 403 (1986) and *ACLU of Georgia v. Rabun County*, 698 F.2d 1098 (11th Cir. 1983)).

Caldwell submits that the presence of the University of California's religious statements and accompanying religious graphics, including a Latin cross on a Bible, on its *Understanding Evolution* website, prevents her from freely using the website without coming into direct contact with an unwanted governmental religious message. Thus, Caldwell submits that her contact with an unwanted religious message on the government-owned and authored *Understanding Evolution* website is equivalent to a citizen's contact with an unwanted religious message such as a Latin cross on government-owned land. However, the Ninth Circuit reasoned that the analysis from the cross line of cases is not applicable to a citizen's use of a government website:

> "Caldwell's situation does not fit neatly into a place already staked out along the continuum of Establishment Clause standing. She is neither so removed from the conduct challenged as the plaintiffs were in *Valley Forge*, nor so close as the plaintiff was in *Vasquez*. Her connection to the writing on the website

> is more tenuous than Buono's to the Preserve where the offending symbol was a Latin cross that was permanently installed on top of a hill, while her complaint is more abstract and her contact less forced than Vasquez's." (Opinion at 14089 and 14090).

The Ninth Circuit appears to have conceded that Caldwell's contact with the religious message on *Understanding Evolution* was direct and offensive to her, and that she is unable to unreservedly use *Understanding Evolution* without encountering the unwanted religious message. However, the Ninth Circuit denied Caldwell standing to challenge this unwanted governmental religious message on the grounds that her "connection to the writing on the website is more tenuous than Buono's to the Preserve where the offending symbol was a Latin cross that was permanently installed on a top of a hill. . . ." *Id.* This portion of the Ninth Circuit's standing test for government websites is confusing and of little guidance to future cases, since it appears to conflate two concepts: Caldwell's *connection* to the governmental religious message; and the *permanence* of the religious symbol on the governmental website. The Ninth Circuit fails to explain how the permanence of the six-foot cross in *Buono* makes the religious message conveyed by the cross more offensive to a citizen than an express statement of government endorsement of a particular religious doctrine accompanied by a Latin cross published on a government website. If the Ninth Circuit's *permanence* test is to be measured in temporal terms, Caldwell would point out that

offensive versions of the governmental religious message have now been present on *Understanding Evolution* for more than three years. Moreover, if the Ninth Circuit's *permanence* element is to be measured temporally, its decision in this case fails to explain what quantity of years would be considered *permanent*. On the other hand, if, by *permanence*, the Ninth Circuit is referring to the fact that a message on a website can be modified, then, by definition, the Ninth Circuit's standing rule announced in this case means that no citizen would ever be able to challenge the constitutionality of a governmental endorsement of religion on a website. In other words, a violation of the Establishment Clause must involve something tangible such as real property or physical objects.

The second part of the Ninth Circuit's standing test applied in this case – her *connection* to the website's content – involves a qualitative assessment of Caldwell's motive for using the *Understanding Evolution* website in comparison with Buono's motive for using the vast Mojave Desert preserve in *Buono*. Caldwell respectfully submits that this second prong of the Ninth Circuit's standing test announced in this case veers far beyond the elements of standing announced by this court in *Valley Forge* and *Lujan*. In both of those cases, standing was rejected because the citizens had not alleged that they were actually using the governmental resource where the alleged violation took place, and they had not alleged direct exposure to the governmental activity constituting the violation. *Valley Forge*, 454 U.S. at 469, *Lujan*, 504

U.S. 564. In contrast, Caldwell alleges that she actually uses the government property in question, and that she actually comes into direct contact with the offensive governmental action.

However, the Ninth Circuit now adds a novel new test for standing in this case – that the citizen must allege a reason for using the governmental resource that the court deems compelling. The Ninth Circuit's decision in this case demonstrates the inherently arbitrary nature of such an inquiry.

The Ninth Circuit identifies Buono's motive for using the Mojave Desert Preserve as his status as a former Assistant Superintendent for the Preserve. *Buono*, 371 F.3d 446. The Ninth Circuit does not explain how this work history gives Buono a constitutionally relevant reason for using the Mojave Desert Preserve in general, nor does it explain any reason for Buono to use the precise acre of the 1.6 million acre Preserve on which the Latin cross is visible in particular. *Buono*, 371 F.3d 449. The appellate court then identifies Caldwell's interest in using the *Understanding Evolution* website as her interest in "informed participation as a citizen in school board meetings, debates and elections, especially with respect to selection of instructional materials and how teachers teach the theory of evolution in biology classes in the public school." Opinion at 14083. Caldwell's motive for using the government website is deemed by the Ninth Circuit to be not sufficiently compelling to give her standing. Moreover, the concurring opinion in the Ninth Circuit emphasizes that

the webpage Caldwell complains about is one webpage among over 840 pages. Since she can take evasive action to avoid the religious message, she thus lacks standing to challenge the website. Opinion at 14092, Fletcher, concur. In contrast, Buono was deemed to have a right to use the entire 1.6 million acres of the Mojave Desert Preserve, even though the Latin cross was only visible from a portion of one of those acres. *Buono*, 371 F.3d 449. The fact that Buono could have visited 1.59 million acres of the Preserve (99.4%) without coming into contact with the Latin cross was deemed irrelevant to whether he had standing to sue over the cross.

The Ninth Circuit further clouds the waters by discussing cases involving non-voluntary direct contact with unwanted religious messages, i.e., public school Bible reading. Opinion at 14090 citing *School District of Abington v. Schempp,* 374 U.S. 203 (1963), and *Doremus v. Board of Education,* 342 U.S. 429 (1952). Besides the fact that those cases are entirely off point, the cross line of cases, discussed above, prove that involuntary use of a governmental resource has never been thought to be an element of standing under *Valley Forge* and *Lujan* before this case.

2. A direct stake in the outcome should be the focus of standing in the context of government websites.

In formulating a test for Article III standing in the context of Establishment Clause violations via government activities on the internet, the challenge is to narrow standing such that the courts do not become venues for a "debating society." *Valley Forge*, 454 U.S. at 472. As this Court has stated, it is important that the complainant have a "direct stake in the outcome." *Valley Forge*, 454 U.S. at 472 (citing *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)). When the Ninth Circuit determined that Caldwell had a closer interest in the outcome than the plaintiffs in *Valley Forge*, yet declined to follow the cross line of cases, the reasoning appears to be that personal contact with government endorsement of particular religious views is actionable when it occurs in the physical world but not in the virtual world. That is a position which is problematic in a society which the preferred means of conducting the business of government is now online.

The Ninth Circuit's answer to this novel legal question of what is a "direct stake" in an Establishment Clause challenge is a bright line rule that physical contact with an offending display is necessary. As discussed above, this physical contact is referred to by the appellate court as "permanence." Opinion at 14089 and 14090. Such a bright line rule for Article III standing should be rejected as antiquated. It is Caldwell's position that the Court of

Appeal's position is inadequate for a world that has changed substantially since the courts first began to wrestle with the concept of standing within the Establishment Clause context.

It is important to note what Caldwell is not seeking. She is not seeking a change in the requirements for Article III standing. Rather, she is asking that the Court grant certiorari as means to fashion a test that gives guidance to state actors that deal with the public online, and the judiciary, as to how Article III requirements relate to government activity on the internet.

Caldwell's position is that a test can be crafted in which standing, relative to the internet, is based upon whether the complainant is engaging in an online activity for which the website is intended to operate, and, whether the complainant is able to use the website unreservedly without encountering an offensive religious symbol or message that is inconsistent with the Establishment Clause. Such a citizen would have the direct stake in the outcome of the litigation that meets the prerequisites of standing under Article III, as well as under prudential standing principles.

CONCLUSION

One of the remarkable aspects of the U.S. Constitution is that the drafters created an instrument that sets a broad workable structure for operating a government. Applying the cases or controversies requirement of Article III standing to the emerging claims involving violations of the Establishment Clause on government websites is a challenge that this Court should meet. Thus, the petition for writ of certiorari should be granted.

Respectfully submitted,

KEVIN T. SNIDER
Counsel of Record
MATTHEW B. MCREYNOLDS
PACIFIC JUSTICE INSTITUTE
Post Office Box 276600
9851 Horn Road, Suite 115
Sacramento, California 95827
(916) 857-6900 (Telephone)
(916) 857-6902 (Facsimile)

LARRY J. CALDWELL
CALDWELL LAW FIRM
1380 Lead Hill Blvd., Suite 106
Roseville, California 95661
(916) 677-4254 (Telephone)
(916) 671-8322 (Facsimile)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Jeanne E. Caldwell,

Plaintiff-Appellant,

v.

Roy L. Caldwell, in his official capacity as Director of the University of California Museum of Paleontology; David Lindberg in his official capacity as Chair of the Integrative Biology Department of the University of California-Berkeley; Michael D. Piburn, in his official capacity as Program Director for the National Science Foundation.

Defendants-Appellees.

No. 06-15771

D.C. No.
CV-05-04166-PJH

OPINION

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted
May 14, 2008 – San Francisco, California

Filed October 3, 2008

Before: Betty B. Fletcher and Pamela Ann Rymer, Circuit Judges, and Kevin Thomas Duffy,* District Judge.

Opinion by Judge Rymer;
Concurrence by Judge B. Fletcher

COUNSEL

Larry Caldwell, Quality Science Education for All, Roseville, California, Kevin T. Snider (argued), Pacific Justice Institute, Sacramento, California, for the plaintiff-appellant.

William J. Carroll (argued), Katharine Demgen, Morgenstein & Jubelirer LLP, San Francisco, California, Jeffrey A. Blair, Christopher M. Patti, University of California, Office of the General Counsel, Oakland, California, for defendants-appellees Roy L. Caldwell, Ph.D., and David Lindberg.

Robert M. Loeb, Lowell V. Sturgill Jr. (argued), United States Department of Justice, Civil Division, Washington, D.C., for defendant-appellee David Campbell.

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* The Honorable Kevin Thomas Duffy, Senior United States District Judge for the Southern District of New York, sitting by designation.

OPINION

RYMER, Circuit Judge:

We must decide whether Jeanne E. Caldwell, who asserts an interest in being informed about how teachers teach the theory of evolution in biology classes, has standing to pursue an Establishment Clause claim arising out of her offense at the discussion of religious views on the "Understanding Evolution" website created and maintained by the University of California Museum of Paleontology and funded in part by the National Science Foundation. She avers that the website endorses beliefs which hold that religion is compatible with evolutionary theory and disapproves beliefs, such as her own, that are to the contrary, thereby exposing her to government-endorsed religious messages and making her feel like an outsider. In a published opinion, the district court concluded that Caldwell's allegations state only a generalized grievance insufficient for injury in fact, and dismissed the complaint. *Caldwell v. Caldwell*, 420 F.Supp.2d 1102, 1007 [sic] (N.D. Cal. 2006). We also conclude that the harm asserted by Caldwell to her interest in being informed about the teaching of evolutionary theory is too generalized and remote to confer standing against the University of California faculty who administer the website and develop its content on behalf of the Museum of Paleontology. Caldwell's complaint against the Director of the National Science Foundation has become moot since her appeal was taken. Therefore, we affirm.

I

Caldwell's complaint pursuant to 42 U.S.C. § 1983 alleges that she is the parent of children in the California public schools, and is actively involved in elections and debates about the selection of instructional materials for science classes. She uses the website, "Understanding Evolution," to participate as an informed citizen in these elections, debates, and processes.

Roy L. Caldwell, Director of the University of California's (UC) Museum of Paleontology, and David Lindberg, Chair of the Integrative Biology Department at UC Berkeley, developed the website's content and administer it.[1] They applied for a grant from the National Science Foundation (NSF)[2] to create a website "to provide professional development opportunities to broaden and deepen the disciplinary knowledge and pedagogical skills of teachers, thus improving their ability to deliver rich and challenging science, mathematics and technology education to all students." NSF awarded the grant on May 10, 2001.

The website consists of some 840 pages. Its stated purpose is:

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[1] Professor Lindberg and the Museum Director are sued in their official capacities as University employees, so we refer to them collectively as "UC."

[2] Michael D. Piburn was the NSF Program Director at the time. As he was sued in his official capacity, we substitute the current Program Director, David Campbell.

> Understanding Evolution is a non-commercial, education website, teaching the science and history of evolutionary biology. This site is here to help you understand what evolution is, how it works, how it factors into your life, how research in evolutionary biology is performed, and how ideas in this area have changed over time.

http://evolution.berkeley.edu. The website has a number of subsites, one of which is "Understanding Evolution for Teachers." This subsite in turn is organized into a number of sections, including one called "Misconceptions" that addresses misconceptions about evolution and the mechanisms of evolution. Caldwell's complaint focuses on a page titled "Misconception: 'Evolution and Religion are Incompatible.'" http://evolution.berkeley.edu/evosite/misconceps/IVAandreligion.shtml. Beneath text elaborating the point[3] is

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[3] The page has been edited over time, but in the version attached to the complaint, opened with text that stated in full:

> **Misconception: "Evolution and religion are incompatible."**
>
> **Response:** Religion and science (evolution) are very different things. In science (as in science class), only natural causes are used to explain natural phenomena, while religion deals with beliefs that are beyond the natural world.
>
> The misconception that one has to choose between science and religion is divisive. Most Christian and Jewish religious groups have no conflict with the theory of evolution or other scientific findings. In fact, many religious people, including theologians, feel that a deeper understanding of nature actually enriches

(Continued on following page)

a cartoon that depicts a smiling scientist in a lab coat holding a fossil skull shaking hands with a smiling cleric in a collar holding a book marked with a small cross.

Caldwell alleges that the site endorses the religious viewpoint that religious beliefs are limited to the spiritual world; that the theory of evolution is not in conflict with properly understood Christian religious beliefs; that the "Misconception" page links to a National Center for Science Education (NCSE) web page that includes statements by many religious organizations in support of the endorsed position that most Christian and Jewish religious groups have no conflict with the theory of evolution; and that the site seeks to proselytize public school students and the public to adopt these viewpoints. The complaint avers that Caldwell is offended by the government's endorsement of religions and religious denominations when she visits the site; that people such as she who believe that their religious belief is incompatible with evolutionary theory are made to feel like outsiders by the State of California and the United States; and that she has been exposed to the government-endorsed religious messages to her harm because UC has opened the site to the general public. Caldwell requests an injunction restraining publication of the website and a judgment declaring that inclusion of

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their faith. Moreover, in the scientific community, there are thousands of scientists who are devoutly religious and also accept evolution.

the religious and anti-religious materials in the Understanding Evolution website is unconstitutional.

UC and NSF moved to dismiss for lack of standing. The district court held that Caldwell failed to make out taxpayer standing with respect to both the federal and state parties, an issue that is not appealed. Relying on *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982), the court also found that Caldwell's allegations constitute no more than the generalized grievances of one who observes government conduct with which she disagrees. Accordingly, it dismissed the complaint on the ground that Caldwell has not shown injury in fact.

Meanwhile, Caldwell had moved at oral argument for leave to amend her complaint to include additional allegations that the Understanding Evolution website is aimed at the general public as well as at K-12 teachers, and that UC has expressly invited members of the general public to visit and use the website. Asked to clarify its dismissal order in this respect, the court explained that it denied leave to amend because the additional allegations would have no bearing on whether Caldwell adequately alleged cognizable injury in fact given that the court's decision was based on the understanding that UC's website was always open to the public.

Caldwell timely appealed.

II

We first consider the status of Caldwell's action against NSF because mootness has been suggested. Paragraph 16 of the complaint alleges that the grant "runs through October 31, 2006," and ¶ 19 avers: "The grant started on April 1, 2001, and expires on October 31, 2006." The government represents that this is so, i.e., the grant in fact expired on October 31, 2006, and that no funding has occurred since then or is likely to occur in the future. *See Chandler v. Miller*, 520 U.S. 305, 313 n.2 (1997). Caldwell does not seriously contend otherwise. For these reasons, the appeal as to NSF is moot.

III

Next we address Caldwell's contention that she could have added amendments to her complaint that would have sufficiently pleaded injury in fact, as well as meritorious Establishment Clause claims. There is no issue as to the latter because the merits were neither reached by the district court nor raised on appeal. As to standing, the proffered amendments would be meaningless because ¶ 26 of the complaint already alleges that UC opened the Understanding Evolution website to the public. Both the district court, and we, take it as true for purposes of whether dismissal is proper that, as pled, the website is public.

IV

The heart of Caldwell's position is that *Valley Forge,* embraced as the controlling authority by UC and the district court, is inapposite and that the "cross" cases, exemplified by *Buono v. Norton,* 371 F.3d 543 (9th Cir. 2004), provide the more apt analogy. *See also Separation of Church and State Comm. v. City of Eugene,* 93 F.3d 617 (9th Cir. 1996) (*SCSC*); *Ellis v. City of La Mesa,* 990 F.2d 1518 (9th Cir. 1993). Caldwell submits that, like the plaintiffs in those cases, she also came into direct contact with a religious symbol on property owned by the government which she finds offensive; and that, just as the inability of plaintiffs in those cases freely to use public land sufficed as injury in fact, so too should it suffice that she is inhibited from freely using a government resource without running into religious symbols and theological statements which offend her.

A party has Article III standing if she suffers an "injury in fact," the injury is fairly traceable to the challenged conduct, and the injury is likely to be redressed by a favorable judicial decision. *Buono,* 371 F.3d at 546; *see Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). Even so, "the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge,* 454 U.S. at 474-75 (quoting *Warth v. Seldin,* 422 U.S. 490, 499-500 (1975)).

In *Valley Forge,* Americans United for Separation of Church and State along with four of its employees, based in the Washington, D.C. area, learned through a news release that surplus government property had been transferred to Valley Forge Christian College in Chester County, Pennsylvania. They challenged the transfer on Establishment Clause grounds. The Court held that Americans United were without standing as taxpayers, and had not established standing by virtue of an injury in fact. Elaborating the requirement for injury in fact, the Court observed that it is not enough for a party to claim that the Establishment Clause has been violated; "[s]uch claims amount to little more than attempts to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *Id.* at 483 (internal quotations and citations omitted). Thus, the complaint of Americans United was deficient because "[t]hey fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Id.* at 485-86 (emphasis in original).[4]

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[4] Having so concluded, the Court reiterated that standing may be predicated on noneconomic injury, citing *United States v. SCRAP,* 412 U.S. 669 (1973). *SCRAP* recognized that plaintiffs who used natural resources for recreational and aesthetic

(Continued on following page)

In *Buono,* the plaintiff, a retired employee of the Park Service who had been Assistant Superintendent of the Mojave National Preserve and regularly visited it, complained that a Latin cross atop Sunrise Rock violated the Establishment Clause and was offensive to him. He regarded the cross as offensive because it was on federal property – not because of the cross as such – and the district court found that Buono would tend to avoid Sunrise Rock as long as the cross remained standing. We held that *Valley Forge* "drew a distinction between abstract grievances and personal injuries, not ideological and religious beliefs," 371 F.3d at 547, and that Buono's inhibition from freely using the Preserve sufficed as injury in fact[5] and constituted "personal injury suffered . . . *as a consequence* of the alleged constitutional error." *Id.* (emphasis in original) (quoting *Valley Forge,* 454 U.S. at 485).

Since *Buono,* we have also considered standing to pursue an Establishment Clause challenge in the

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purposes that would be adversely affected by a municipal fee had standing, as they alleged specific and perceptible harm that distinguished them from other citizens who had not used these resources. In *Valley Forge,* however, the Court "simply [could not] see . . . *injury* of *any* kind, economic or otherwise." *Id.* at 486 & n.23 (emphasis in original).

[5] We had so held before in *SCSC,* 93 F.3d at 619 n.2, and *Ellis,* 990 F.2d at 1523. In each, parties offended by the presence of a cross on government property alleged that the cross prevented them from unreservedly using the area where the cross was installed. *See Buono,* 371 F.3d at 547 (citing both cases).

context of a government seal. In *Vasquez v. Los Angeles County,* a county employee was forced to have daily contact with a county seal from which a cross had been removed and which he regarded, for this reason, as an offensive anti-religious symbol. 487 F.3d 1246, 1249 (9th Cir. 2007). We held that Vasquez had standing even though he had taken no affirmative steps to avoid areas where the symbol was located; we did not think it necessary to require a change of behavior – in his case, to quit his job – in order to vindicate spiritual harm from unwelcome direct contact with an allegedly offensive religious (or anti-religious) symbol. Nor did we think Vasquez's contact with the symbol too tenuous, indirect, or abstract to give rise to Article III standing given that he held himself out as a member of the community where the seal was located, as someone forced into frequent regular contact with it, and as someone directly affected by unwelcome direct contact with a symbol that was pervasively on display. We thought *Valley Forge* distinguishable in this respect, because the plaintiffs there were physically removed from the allegedly unconstitutional conduct, and because Vasquez had alleged more than "a mere abstract objection" to removal of the cross from the county seal. *Id.* at 1251 (quoting *Suhre v. Haywood County,* 131 F.3d 1083, 1086 (4th Cir. 1997)).

Caldwell's situation does not fit neatly into a place already staked out along the continuum of Establishment Clause standing. She is neither so removed from the conduct challenged as the plaintiffs

were in *Valley Forge,* nor so close as the plaintiff was in *Vasquez.* Her connection to the writing on the website is more tenuous than Buono's to the Preserve where the offending symbol was a Latin cross that was permanently installed on a top of a hill, while her complaint is more abstract and her contact less forced than Vasquez's.

It is instructive to compare *School District of Abington v. Schempp,* 374 U.S. 203 (1963), and *Doremus v. Board of Education,* 342 U.S. 429 (1952), as the Supreme Court did in *Valley Forge*. 454 U.S. at 486 n.22. *Schempp* is the source of the rule which informed our decision in the seal case, that unwelcome direct contact with an allegedly offensive religious or anti-religious symbol, suffices for Article III standing. *See Vasquez,* 487 F.3d at 1251-53. In *Schempp,* children enrolled in public school together with their parents objected to a Bible reading in the classroom that was mandated by state law. The Court found the interests asserted sufficient for standing because these plaintiffs were "directly affected by the laws and practices against which their complaints are directed." *Schempp,* 374 U.S. at 224 n.9. This contrasts with *Doremus,* in which the same issues were raised but in which parents lost standing to sue when their children were graduated. 342 U.S. at 432-33. *See also Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 12-18 (2004) (holding that parent whose custodial rights were unclear lacked prudential standing to pursue an Establishment Clause claim aimed at recitation of the Pledge of Allegiance in his

daughter's classroom). As the Court explained in *Valley Forge,*"[t]he plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause – for as *Doremus* demonstrated, that is insufficient – but because impressionable school children were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." 454 U.S. at 486 n.22.

We conclude that Caldwell's asserted interest – informed participation as a citizen in school board meetings, debates, and elections, especially with respect to selection of instructional materials and how teachers teach the theory of evolution in biology classes in the public schools – is not sufficiently differentiated and direct to confer standing on her to challenge the University of California's treatment of religious and anti-religious views on evolution. An interest in informed participation in public discourse is one we hold in common as citizens in a democracy. While people inside and outside the academy may (and do) take different views in the ongoing debate over whether science and religion may coexist, Caldwell's offense is no more than an "abstract objection" to how the University's website presents the subject. The court must refrain from becoming "a judicial version [ ] of college debating forums." *Vasquez,* 487 F.3d at 1251 (quoting *Valley Forge,* 454 U.S. at 473). That she is the parent of school-age children makes her position no less remote, for her connection to the University of California website is not similar to the relationship in *Schempp* between parents whose

children are directly exposed to unwelcome religious exercises in the classroom and the school district. Accordingly, we believe there is too slight a connection between Caldwell's generalized grievance, and the government conduct about which she complains, to sustain her standing to proceed.

AFFIRMED.

FLETCHER, Circuit Judge, concurring:

I concur in the majority opinion. I write separately to elaborate more fully why Caldwell lacks standing.

Caldwell's injury is limited to "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982). Caldwell does not allege that her children's school has incorporated the offending views expressed on the UE website into its science curriculum or that her children's biology teacher articulated them in response to a student's question. Thus, there is no allegation that Caldwell's children or Caldwell herself were "directly affected" by the offensive content of the UE website. *Cf. School District of Abington v. Schempp*, 374 U.S. 203, 224 n.9 (1963) (holding that public school pupils and their parents who objected to Bible reading in school had standing because they were "directly

affected by the laws and practices against which their complaints [were] directed").

Caldwell also does not allege that her contact with the offensive views expressed on the UE website was "frequent and regular" or "unwelcome." *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1251, 1252 (9th Cir. 2007). There is no allegation that Caldwell had any reason to visit the offending web page more than once. *Cf. id.* at 1248, 1249, 1253 (holding that county resident and employee who had daily, unwelcome contact with allegedly anti-religious county seal had standing). Nor did the single offending web page prevent Caldwell from freely using the rest of the UE website: the site comprises approximately 840 pages, each of which can be viewed without having first viewed the offending page. *Cf. Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004) (holding that plaintiff who was "unable to freely use" the area of the Mojave National Preserve around a Latin cross because of the government's allegedly unconstitutional actions had standing (internal quotation marks, editorial marks, and citation omitted)).

Moreover, while "[w]e have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact," *id.* (citation omitted), I am not persuaded that inability unreservedly to use a government-run website necessarily also suffices as injury-in-fact. Accessing and leaving a website is quick and easy, and the alleged offense from the content of one page out of 840 that one need not read or tarry over is fleeting at best. While in certain cases the inability to

access a government-run website due to allegedly unconstitutional content may well confer standing, I conclude that Caldwell's injury is too de minimis to satisfy the standing doctrine's core aim of "improving judicial decision-making by ensuring that there is a specific controversy before the court and that there is an advocate with sufficient personal concern to effectively litigate the matter." *Vasquez*, 487 F.3d at 1250 (internal quotation marks, editorial marks, and citation omitted).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEANNE E. CALDWELL
Plaintiff,
v.
ROY L. CALDWELL, PH.D, et al.,
Defendants.
/

No. C 05-4166 PJH

ORDER GRANTING MOTION TO STRIKE AND MOTION TO DISMISS

(Filed Mar. 13, 2006)

Defendants' motion to dismiss and motion to strike portions of plaintiff's complaint came on for hearing before this court on February 8, 2006. Plaintiff Jeanne E. Caldwell appeared through her counsel, Larry Caldwell, Kevin T. Snider, and Matthew McReynolds. Defendants Roy L. Caldwell and David Lindberg (collectively "defendants") appeared through their counsel, William J. Carroll and Christopher M. Patti. Having read the papers filed in conjunction with the motion and carefully considered the arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS defendants' motions, for the reasons stated at the hearing and as follows.

BACKGROUND

Plaintiff is the mother of three and a resident of Placer County, California. Two of her children currently attend public school in Placer County.

Defendants occupy posts at the University of California at Berkeley ("UC Berkeley"): defendant Caldwell is the Director of the University of California Museum of Paleontology, and defendant Linburg is the Chair of the Integrative Biology Department of the University of California at Berkeley.[1]

On October 14, 2005, plaintiff filed the instant complaint, in which she takes issue with a website published by the University of California, http://evolution.berkeley.edu (the "Understanding Evolution" website). The website is part of a larger website maintained by the UC Berkeley Museum of Paleontology. Its purpose is to educate teachers and the general public about the science and history of evolutionary biology. *See* Def. Op. Br. at 3:13-16.

Plaintiff's complaint alleges that the Understanding Evolution website contains certain web pages that operate to impermissibly endorse, advance and proselytize certain religious beliefs. In particular, plaintiff alleges that the website pages endorse the following: (1) the religious doctrine that religion and religious beliefs are limited to the spiritual and supernatural world; (2) the religious doctrine that the theory of evolution is not in conflict with properly understood Christian or Jewish religious beliefs; (3) content contained on a link from the website to the National Center for Science Education ("NCSE"),

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[1] Defendant Michael Piburn, Program Director for the National Science Foundation, is not a party to this motion.

which contains seventeen doctrinal statements on the theory of evolution in support of the website's theory that evolution is not in conflict with many Christian and Jewish religions; and (4) the religious beliefs and religious viewpoints advocated by the NCSE, including the seventeen statements just referenced. *See* Complaint for Declaratory and Injunctive Relief and Nominal Damages for Violation of the Establishment Clause of the First Amendment to the United States Constitution ("Complaint"), ¶ 24.

As a result of this endorsement, plaintiff alleges that the government violates the First Amendment Establishment Clause by setting up a preference for certain religious groups over others – i.e., for those groups who are not in conflict with evolution over those who are. *See id.* at ¶ 29. Plaintiff asserts this violation has caused her to suffer injury, because she is "offended" when she views the website, and made to feel like an "outsider." *Id.* at ¶ 26.

Defendants have moved to dismiss plaintiff's complaint in its entirety, arguing that plaintiff lacks standing, and that her allegations cannot state an Establishment Clause claim on the merits in any event. Defendants have also moved to strike paragraph 40(c) of plaintiff's complaint, which alleges a prayer for "nominal damages in the sum of $100."

As part of their motion to dismiss, defendants have also filed a request for judicial notice, in which they request that the court judicially notice the website pages at issue – namely, the entire Museum

of Paleontology website, including the "Understanding Evolution" portion of the website.[2]

DISCUSSION

A. Legal Standards

A court will dismiss a claim under Fed. R. Civ. P. 12(b)(6) for failure to state a claim only where it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. *See, e.g., Broam v. Brogan*, 320 F.3d 1023, 1033 (9th Cir. 2003) (citations omitted). In evaluating a motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *See, e.g., Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000) (citations omitted).

A court may also strike any "insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Fed. R. Civ. Proc. 12(f). A motion to strike will be granted where plaintiff has made an improper demand or prayer for relief as a matter of

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[2] As the court noted at the hearing on the instant motions, both parties filed briefs in violation of Civil L.R. 3-4(c)(2), which requires that all footnotes be of the same font size as the body of the text. Accordingly, and in view of the violation, the court hereby STRIKES all footnotes cited in the parties' briefs, and declines to consider the substance of any content contained therein.

law. *See, e.g., Bureerong v. Uvawas,* 922 F. Supp. 1450, 1479 n.34 (C.D. Cal. 1996). Notwithstanding, motions to strike are regarded with disfavor because of the limited importance of pleadings in federal practice. *See, e.g., Colaprico v. Sun Microsystems,* 758 F. Supp. 1335, 1339 (N.D. Cal. 1996).

B. Motion to Strike

Defendants request that the court plaintiff's prayer for "nominal damages in the sum of $100." *See* Complaint at 15:1-2. They assert that Eleventh Amendment immunity applies to state officials like defendants, and limits the relief that may be awarded against them to prospective injunctive relief, specifically excluding damages awards that require payment of funds from the state treasury. In response, plaintiff contends that nominal damages have previously been upheld by federal courts against state actors, and that the Ninth Circuit has expressly "left the door open to the possibility" that nominal damages may be considered equitable – and therefore outside the confines of the Eleventh Amendment – in cases such as this one, where the primary remedies sought are equitable in nature.

Resolution of the instant motion depends on whether Eleventh Amendment immunity applies to defendants as state officials, and if so, whether it bars nominal damages under Ninth Circuit law.

Defendants are employees and officials of a state university. It is well-established that a state university – and UC Berkeley explicitly – is entitled to Eleventh Amendment immunity. *See, e.g., Thompson v. City of Los Angeles,* 885 F.2d 1439, 1443 (9th Cir. 1989) (noting the well-established rule that the UCs are "states" for Eleventh Amendment immunity purposes). It is equally well-established that state employees sued in their official capacity as state officials are also entitled to Eleventh Amendment immunity. *See Students for a Conservative Am. v. Greenwood,* 378 F.3d 1129, 1130 (9th Cir. 2004). This is the case here: plaintiff has sued defendants in their official capacities as state employees. Accordingly, since plaintiff has made no allegation that defendants have waived Eleventh Amendment immunity, the immunity applies.

Pursuant to that immunity, a request for monetary damages that would require payment from the state's general treasury fund is impermissible. *See Edelman v. Jordan,* 415 U.S. 651, 677 (1973). This would include – as is the case here – nominal damages. *See Taylor v. Westly,* 402 F.3d 924, 929-30 (9th Cir. 2005) (generally, Eleventh Amendment "shields state governments from money judgments in federal courts, and from declaratory judgments against the state governments that would have the *practical effect* of requiring the state treasury to pay money to claimants") (emphasis added).

Moreover, plaintiff's support to the contrary is unavailing. As defendants point out, each case cited

by plaintiff either involves a municipality as a defendant, or in the alternative, involves the United States as defendant in situations in which statutory provisions expressly allow for action to be taken against the Unites States. Neither of these factual scenarios is in evidence here. As such, plaintiff offers no authority demonstrating that the above prohibition on monetary damages – even if nominal – has been abrogated in circumstances such as those here.

Accordingly, defendants' motion to strike is GRANTED.

C. Motion to Dismiss

Defendants seek dismissal on two grounds. First, defendants assert that plaintiff lacks standing. Second, they assert that in the event standing exists, plaintiff's allegations nonetheless fail to state a claim for violation of the Establishment Clause on the merits. Plaintiff challenges both assertions.

1. Request for Judicial Notice

Prior to analyzing the merits of the above arguments, the court must first resolve defendants' request for judicial notice. Specifically, defendants seek to have judicial notice taken of the UC Berkeley Museum of Paleontology website, http://www.ucmp.berkeley.edu/museum/museum.php, including the Understanding Evolution portion of the site that is directly at issue (i.e., http://evolution.berkeley.edu/).

See Request for Judicial Notice in Support of Motion to Dismiss. Defendants assert that the website provides necessary context, and base their request on case law from the Central District of California holding that judicial notice of websites is proper, as well as Ninth Circuit authority stating that a document that is not a part of the complaint or record may be incorporated by reference if it is the source of plaintiff's complaint or plaintiff's complaint refers to it extensively. *See Wible v. Aetna Life Ins. Co.,* 375 F. Supp. 2d 956, 965 (C.D. Cal. 2005); *United States v. Ritchie,* 342 F.3d 903, 908 (9th Cir. 2003). Defendants have not attached a hard copy of any portion of the website to their request.

Generally speaking, a court must take judicial notice if a party requests it and supplies the court with the requisite information. *See* Fed. Rule Evid. 201(d). Furthermore, defendants are correct that although the general rule is that the court will look only to the four corners of the complaint, the court may look outside the complaint where the outside document has been referenced by, or relied on in the complaint itself. *See United States v. Ritchie,* 342 F.3d at 908. Defendants are also correct that the Central District of California has found websites to be a proper subject for judicial notice. *See, e.g., Wible v. Aetna Life Ins. Co.,* 375 F. Supp. 2d at 965.

The court agrees with the proposition that, as a general matter, websites and their contents may be proper subjects for judicial notice. However, the cases cited by defendants are distinguishable from the facts

here because in those cases, defendants appear to have supplied the court with hard copies of the actual web pages of which they sought to have the court take judicial notice. Indeed, Federal Rule of Evidence 201(d) generally contemplates that a party will provide the copy of the document it seeks to have judicially noticed. After all, the language of the rule provides that judicially noticeable facts are those which are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b). Here, by contrast, without the actual web pages before it, the court is unable to pass on the nature of facts contained within the entire website, whose accuracy cannot be determined with reference to anything concrete. This is especially significant, given the changing and changeable nature of internet websites. Indeed, the parties' own arguments here bear out the importance of providing the court with the web pages for which judicial notice is sought. The parties cannot even agree on the actual content of the website at issue, and the only webpages in evidence are those submitted by plaintiff as an attachment to her complaint.[3]

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[3] At the hearing, the parties made competing arguments regarding the status of the Understanding Evolution website, and in particular whether defendants have altered the website since the filing of plaintiff's complaint. After the hearing, both parties submitted additional letters to the court on this same issue, each again arguing their respective positions as to whether factual changes have been made to the website at issue.

(Continued on following page)

Accordingly, the court finds that defendants' request for judicial notice is deficient for failure to comply with Rule 201. While the court agrees with defendants that they should not be required to submit an entire website as an exhibit, which might number several thousands of pages, at a minimum, defendants must provide the specific webpages upon which they will base their arguments and/or the specific pages which they claim provide the necessary context for their arguments.

Defendants' request is therefore DENIED, without prejudice.

2. Standing

To satisfy constitutional standing requirements, a plaintiff must prove that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of*

In view of the court's ruling on defendants' judicial notice request, as stated herein, the court does not consider these arguments either way on the question whether the Understanding Evolution website has materially changed, but references this dispute by way of illustration only.

Wildlife, 504 U.S. 555, 560-561 (1992); *Schmier v. U.S. Ct. of App. for Ninth Cir.,* 279 F.3d 817, 820-21 (9th Cir. 2002). In addition to these constitutional requirements, certain "prudential rules" have been crafted, which prohibit federal courts from being forums for hearing generalized grievances by taxpayers, and which allow for standing to be premised on a plaintiff's status as state or federal taxpayer only if certain requirements are met. *See Bell v. City of Kellogg,* 922 F.2d 1418, 1422 (9th Cir. 1991).

Defendants assert that plaintiff has no standing for the following reasons: (1) plaintiff fails to allege federal taxpayer standing; (2) plaintiff fails to allege state taxpayer standing; and (3) plaintiff fails to allege cognizable injury in fact.

a. federal taxpayer standing

The requirements for federal taxpayer standing are two-fold: first, the plaintiff taxpayer must establish a logical link between taxpayer status and the type of legislative enactment attacked. Second, the plaintiff taxpayer must establish a nexus between taxpayer status and the precise nature of the constitutional infringement alleged. *See, e.g., Flast v. Cohen,* 392 U.S. 83, 102-03 (1968); *Bell,* 922 F.2d at 1422. Under this two-pronged test, plaintiff may allege only the unconstitutionality of exercises of congressional power under the taxing and spending clause – it is not sufficient to allege an incidental expenditure of tax funds in the administration of an

essentially regulatory statute. *See Flast*, 392 U.S. at 102. The plaintiff must also show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power. *Id.*

Plaintiff's complaint fails to make those requisite allegations here. First, plaintiff nowhere alleges any type of qualifying "legislative enactment" or congressional act. Plaintiff alleges only that the Understanding Evolution website was funded in part by a $523,261 grant from the National Science Foundation ("NSF"), a federal entity. *See* Complaint at ¶¶ 14, 18. Plaintiff does not allege that the partial grant resulted from any type of direct congressional action. In sum, plaintiff's allegations amount to a complaint against the NSF's administrative decision to partially fund the Understanding Evolution website, not – as required – to a complaint against congressional action under the taxing and spending clause. As such, plaintiff's allegations are the essence of what *Flast* prohibits – taxpayer standing on the basis of an incidental expenditure of tax funds in the administration of an essentially regulatory statute.

Second, the "nexus" between plaintiff's taxpayer status and the nature of the alleged constitutional infringement is missing. Plaintiff does not allege any congressional involvement in the NSF's decision to provide partial funding for the Understanding Evolution website, or that the NSF merely acts as a vehicle to carry out Congress' orders and directives. These facts beg the same result as the holding in *Fordyce v.*

Frohnmayer, 763 F. Supp. 654 (D. D.C. 1991), a case cited by defendants. In *Fordyce,* the court rejected plaintiff's federal taxpayer standing claim because plaintiff alleged only that a grant and sponsorship from the National Endowment for the Arts violated the Establishment Clause. The court specifically found that the required "nexus" for federal taxpayer standing was missing because plaintiff was not alleging direct congressional involvement in the NEA's decision to partially fund the exhibition in question, and plaintiff's allegations amounted to no more than a challenge to a decision made solely by an agency of an executive branch. *See* 763 F. Supp. at 657.

Accordingly, the court finds that plaintiff has failed to allege federal taxpayer standing, and plaintiff's complaint cannot be supported on this ground.

b. state taxpayer standing

In response to defendants' argument that plaintiff similarly fails to allege state taxpayer standing, plaintiff asserts that she has alleged all elements necessary to plead state taxpayer standing: that she is a state taxpayer, and that "measurable sums of public funds are being used to further the actions of Defendants." Complaint at ¶¶ 9, 37.

The seminal state taxpayer standing case is *Doremus v. Board of Education,* 342 U.S. 429 (1952). In that case, the Supreme Court explained that a state taxpayer has standing when the taxpayer is

able to show that s/he "has sustained or is immediately in danger of sustaining some direct injury as the result of [the challenged conduct's] enforcement." *See* 342 U.S. at 434. The direct injury requirement is in turn established when the taxpayer brings a "good-faith pocketbook action" – i.e., when the challenged statute or conduct involves the "measurable appropriation or disbursement" of state tax revenues. *See id.*; *see also Cammack v. Waihee,* 932 F.2d 765, 769 (9th Cir. 1991); *Hoohuli v. Ariyoshi,* 741 F.2d 1169, 1178 (9th Cir. 1984) (pleadings must set forth the "relationship between taxpayer, tax dollars, and the allegedly illegal government activity").

In *Cammack,* state taxpayer standing was found where plaintiffs set forth their status as state taxpayers and specifically stated the amount of funds appropriated and allegedly spent by the taxing governmental entities as a result of the allegedly unconstitutional conduct. *See* 932 F.2d at 771. And in *Hoohuli,* state taxpayer standing was found where the taxpayers challenged the "appropriating, transferring, and spending. . . . of taxpayers' money from the General Fund of the State Treasury. . . . ," and where the plaintiffs' pleadings set forth with specificity amounts of money appropriated and spent for allegedly unlawful purposes. *See* 741 F.2d at 1180.

Here, by contrast, plaintiff's allegations fall short. Although plaintiff alleges she is a state taxpayer, she fails to allege any specific expenditure of state taxes in connection with the challenged website, let alone the specific amounts of state taxes at issue

(as was the case in both *Cammack* and *Hoohuli*). Plaintiff makes only the general allegation that there is "an identifiable sum of public funds being used to further the actions of the Defendants." This general statement, without more, fails to allege the necessary relationship between plaintiff, the state's expenditure of tax dollars, and the purportedly illegal government conduct occasioned by the Understanding Evolution website. Indeed, "public funds" could mean either state *or* federal taxes. Moreover, given that the only specific sum mentioned in plaintiff's complaint is the $523,261 NSF grant, it is implausible that plaintiff's allegation as to "public funds" and "specific tax dollars" can even be read to refer to state tax dollars.

Accordingly, for the reasons above, the court finds that plaintiff fails to sufficiently allege state taxpayer standing.

c. cognizable injury in fact

Article III standing requires that plaintiff plead a concrete "injury in fact" – i.e., some actual or threatened injury as a result of the purportedly illegal conduct of defendant. *See Valley Forge Christian College v. Am. United for Separation of Church & State,* 454 U.S. 464, 472 (1982). Plaintiff asserts that under Ninth Circuit authority, she need only allege that she came into "direct and unwelcome contact with government-sponsored religious messages that were contrary to her beliefs in a government owned and operated public facility." *See* Opp. Br. at 11:10-17.

Defendants, on the other hand, assert that plaintiff alleges only "psychological injury" stemming from her observation of the website, and that something more than this is required under *Valley Forge.*

In *Valley Forge,* plaintiffs challenged a congressional act that allowed for the transfer of used government property to non-profit, tax-exempt educational institutions, including religious based institutions. The Supreme Court used the case to set forth an exhaustive discussion on standing requirements in the Establishment Clause context, and specifically addressed the "injury in fact" requirement. In determining that no standing existed where plaintiffs alleged "the deprivation of the fair and constitutional use of their tax dollar," the *Valley Forge* court reiterated its prohibition on standing claims that are predicated on "the right, possessed by every citizen, to require that the government be administered according to law . . . ". *See* 454 U.S. at 482-83. The court then went on to state: "Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing . . . even though the disagreement is phrased in constitutional terms." *See id.* at 485-86. The court simultaneously reiterated that standing may nonetheless be based on noneconomic injury. *Id.*

Here, plaintiff alleges that the injury she suffered was in being "offended" by viewing the website, feeling like an "outsider," and "being exposed to the government endorsed religious messages," to her harm. *See* Complaint at ¶ 26. On their face, these allegations fall directly within *Valley Forge*'s prohibition on standing where a plaintiff alleges only a "psychological consequence" produced "by observation of conduct with which one disagrees." As such, plaintiff's allegations state only a generalized grievance against defendants, and are insufficient to confer injury in fact.

Moreover, plaintiff's contrary arguments are unpersuasive. To begin with, plaintiff's reliance on four Ninth Circuit cases upholding citizen standing is misplaced. *See Separation of Church & State Comm. v. City of Eugene,* 93 F.3d 617, 619 n.2 (9th Cir. 1996); *Am. Jewish Congress v. City of Beverly Hills,* 90 F.3d 379, 381-82 (9th Cir. 1996); *Ellis v. City of La Mesa,* 990 F.2d 1518, 1523 (9th Cir. 1993); *Buono v. Norton,* 371 F.3d 543 (9th Cir. 2004). Without fail, each of these cases deals with a factual scenario in which plaintiffs' alleged injuries stemmed from the inability to use a public or municipal park because of an overt religious symbol or message placed in the public park. While plaintiff understandably seeks to analogize this case to those cases, contending that the "public" nature of the Understanding Evolution website compels a similar result, such an analogy is untenable.

First, there is a vast difference between a citizen's inability to use a public park due to the presence of an overtly religious symbol, and a citizen's viewing of a purportedly offensive website. For example, a citizen who voluntarily chooses to access a public park and comes upon an overtly religious symbol may well be prevented from utilizing and enjoying the whole of the park by virtue of the unwelcome message. By contrast, a citizen voluntarily choosing to access the internet who comes across an unwelcome message on a website page is not necessarily prevented from accessing the whole of the internet; the citizen may choose, with a simple click of the mouse, to access a different and unoffensive webpage or website.

Moreover, the unique nature of the internet cannot be overlooked. It is a vehicle for communication that is not capable of ready analogy to any other. The internet contains millions upon millions of websites and webpages, spanning a limitless number of subjects and target audiences. It is in daily use by millions, all of whom decide on a voluntary basis (for the most part) which websites and webpages to access. Given this massive appeal and impossibly broad spectrum, it is simply inconceivable that the mere viewing of certain webpages that do no more than make plaintiff feel "offended" and like an "outsider" is sufficient to give rise to injury in fact standing. If this were so, then every webpage on the internet could give rise to a claim, simply based on an individual's negative emotional response to that

webpage. This is particularly significant, when one considers that the very nature of certain websites and webpages is to be provocative, and to risk offence. This cannot be what was contemplated by either the Supreme Court or the Ninth Circuit when those courts issued the decisions referred to above.

In sum, the court finds that plaintiff has done no more than to allege a generalized grievance that is insufficient to establish "injury in fact" standing. Accordingly, in view of the fact that each of plaintiff's arguments in favor of standing fails, the court GRANTS defendants' motion to dismiss plaintiff's complaint on the grounds that plaintiff lacks standing.[4]

3. Establishment Clause Merits

In view of the above holding, the court need not, and does not, reach the parties' arguments on the

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[4] At the hearing on the instant motions, plaintiff's counsel suggested for the first time that discovery is necessary in order to ascertain whether facts that support standing exist. Plaintiff did not cite to any authority for this proposition, nor is the court aware of any. Indeed, the Ninth Circuit has expressly affirmed the district court's right to decide the standing issue at the pleading stage, as opposed to the summary judgment stage, which takes into account facts established through discovery. *See, e.g., Schmier v. United States Ct. of App. for Ninth Cir.*, 279 F.3d 817, 823-24 (9th Cir. 2002) (holding no error by district court "in deciding the standing issue at the pleading stage") ("th[e] injury element most assuredly remains the proper basis of a motion brought under Fed. R. Civ. P. 12(b)(6)").

merits of the Establishment Clause claim. This conclusion is further buttressed by the fact that the court, as described above, is currently unable to take judicial notice of defendants' website. As such, the court does not have access to what defendants argue is the necessary and relevant context in which to evaluate plaintiff's claim.

Accordingly, consideration on the merits is premature at this juncture, and is better suited to resolution if and when the case is again before this court.

D. Conclusion

For the above reasons, the court GRANTS defendants' motion to strike, DENIES without prejudice defendants' request for judicial notice, and GRANTS defendants' motion to dismiss with prejudice for lack of plaintiff's standing.

IT IS SO ORDERED.

Dated: March 13, 2006

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEANNE E. CALDWELL,

Plaintiff,

v.

ROY L. CALDWELL, PH.D, et al.,

Defendants.

/

No. C 05-4166 PJH

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND VACATING HEARING DATE

(Filed Mar. 20, 2006)

Before this court is the federal defendants' motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief can be granted. Having carefully read the parties' papers and considered the relevant legal authority, the court hereby GRANTS the motion to dismiss for the reasons that follow.[1]

[1] The court finds this motion appropriate for decision without oral argument as permitted by Civil L.R. 7-1(b) and Fed. R. Civ. P. 78. *See also Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp.*, 933 F.2d 724, 729 (9th Cir. 1991) (holding that the court's consideration of the moving and opposition papers is deemed an adequate substitute for a formal hearing), *cert. denied,* 503 U.S. 920 (1992). Accordingly, the March 22, 2006 hearing date is hereby VACATED.

BACKGROUND

A. Facts

Plaintiff is the mother of three and a resident of Placer County, California. Two of her children currently attend public school in Placer County. On October 14, 2005, plaintiff filed the instant complaint against defendants Roy Caldwell and David Lindberg (the "state defendants") and the National Science Foundation ("NSF") and its officials (the "federal defendants"), in which she takes issue with a website published by the University of California, http://evolution.berkeley.edu (the "Understanding Evolution" website).[2] The website, which plaintiff alleges was made possible through a federal grant provided by the NSF in the amount of $523,261, is part of a larger website maintained by the UC Berkeley Museum of Paleontology. *See* Complaint for Declaratory and Injunctive Relief and Nominal Damages for Violation of the Establishment Clause of the First Amendment to the United States Constitution ("Complaint"), ¶ 18. Its purpose is to educate teachers and the general public about the science and history of evolutionary biology. *See* Opening Br. at 1:14-18.

Plaintiff alleges that the Understanding Evolution website contains certain web pages that operate to impermissibly endorse, advance and proselytize

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[2] Defendants, for the purposes of the instant motion, are the National Science Foundation ("NSF"), a federal agency, and relevant NSF officials ("federal defendants").

certain religious beliefs. In particular, plaintiff alleges that the website pages endorse the following: (1) the religious doctrine that religion and religious beliefs are limited to the spiritual and supernatural world; (2) the religious doctrine that the theory of evolution is not in conflict with properly understood Christian or Jewish religious beliefs; (3) content contained on a link from the website to the National Center for Science Education ("NCSE"), which contains seventeen doctrinal statements on the theory of evolution in support of the website's theory that evolution is not in conflict with many Christian and Jewish religions; and (4) the religious beliefs and religious viewpoints advocated by the NCSE, including the seventeen statements just referenced. *See* Complaint, ¶ 24.

As a result of this endorsement, plaintiff alleges that the government violates the First Amendment Establishment Clause by setting up a preference for certain religious groups over others – i.e., for those groups who are not in conflict with evolution over those who are. *See id.* at ¶ 29. Plaintiff asserts this violation has caused her to suffer injury, because she is "offended" when she views the website, and made to feel like an "outsider." *Id.* at ¶ 26.

B. Procedural History

On February 8, 2006, the state defendants moved to dismiss plaintiff's complaint in its entirety, arguing that plaintiff lacks standing, and that her allegations cannot state an Establishment Clause claim on

the merits in any event. On March 13, 2006, the court granted the state defendants' motion to dismiss for lack of standing with prejudice, and in view of that holding, declined to address the viability of plaintiff's Establishment Clause claim.

The federal defendants now move to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). In support thereof, the federal defendants reiterate the same arguments raised by the state defendants in their prior motion: first, that plaintiff lacks standing. Second, that in the event standing is found, plaintiff's Establishment Clause claim fails on the merits.[3]

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[3] The federal defendants have also filed a request for judicial notice, in which they request that the court judicially notice two sets of webpages at issue. The first consists of an overview and site description for the Understanding Evolution website. *See* Federal Defendants' Request for Judicial Notice, Ex. A. The second consists of a description of the National Center for Science Education's mission, along with the "voices for evolution" webpage (sponsored by the NCSE) which plaintiff refers to in Exhibit 2 to her complaint. *See id.* at Ex. B. Unlike a similar request made by the state defendants, the federal defendants here actually provide the court with the webpages they seek to have the court take judicial notice of, as well as proper Ninth Circuit authority. Accordingly, the federal defendants' request for judicial notice is GRANTED.

DISCUSSION

A. Legal Standards

The plaintiff bears the burden of demonstrating that subject matter jurisdiction exists over the complaint when challenged under Fed. R. Civ. P. 12(b)(1). *See, e.g., Tosco Corp. v. Communities for a Better Env't,* 236 F.3d 495, 499 (9th Cir. 2001). Plaintiff also bears the burden of demonstrating that she has standing to pursue the claims alleged in the complaint. *See United States v. Hays,* 515 U.S. 737, 743 (1995) (burden on plaintiff "clearly to allege facts demonstrating that [plaintiff] is a proper party to invoke judicial resolution of the dispute"). Here, since the defendants challenge subject matter jurisdiction on the face of the complaint, all allegations of the complaint are taken as true and all disputed issues of fact are resolved in favor of the non-moving party. *See Love v. United States,* 915 F.2d 1242, 1245 (9th Cir. 1990).

Dismissal under Fed. R. Civ. P. 12(b)(6), by comparison, is warranted only where it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. *See, e.g., Broam v. Bogan,* 320 F.3d 1023, 1033 (9th Cir. 2003) (citations omitted). In evaluating a motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *See, e.g., Burgert v. Lokelani Bernice Pauahi Bishop Trust,* 200 F.3d 661, 663 (9th Cir. 2000) (citations omitted).

B. Standing

To satisfy constitutional standing requirements, a plaintiff must prove that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)); *Schmier v. U.S. Ct. of App. for Ninth Cir.*, 279 F.3d 817, 820-21 (9th Cir. 2002). In addition to these constitutional requirements, certain "prudential rules" have been crafted, which prohibit federal courts from being forums for hearing generalized grievances by taxpayers, and which allow for standing to be premised on a plaintiff's status as state or federal taxpayer only if certain requirements are met. *See Bell v. City of Kellogg*, 922 F.2d 1418, 1422 (9th Cir. 1991).

As the state defendants argued in their earlier motion, the federal defendants here assert that plaintiff has no standing because (1) plaintiff fails to allege federal taxpayer standing; and (2) plaintiff fails to allege cognizable injury in fact. As explained below, the federal defendants prevail on both

arguments, for the same reasons as did the state defendants.[4]

1. Federal Taxpayer Standing

The requirements for federal taxpayer standing are two-fold: first, the plaintiff taxpayer must establish a logical link between taxpayer status and the type of legislative enactment attacked. Second, the plaintiff taxpayer must establish a nexus between taxpayer status and the precise nature of the constitutional infringement alleged. *See, e.g., Flast v. Cohen,* 392 U.S. 83, 102-03 (1968); *Bell,* 922 F.2d at 1422. Under this two-pronged test, plaintiff may allege only the unconstitutionality of exercises of congressional power under the taxing and spending clause – it is not sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. *See Flast*, 392 U.S. at 102. The plaintiff must also show that the challenged enactment exceeds specific constitutional limitations

[4] The federal defendants prevail on their arguments for the additional reason that plaintiff failed to submit a proper opposition to defendants' motion to dismiss. Not only did plaintiff file her opposition more than one week late, plaintiff's opposition fails to address the substance of any argument made by the federal defendants, stating instead in summary fashion that plaintiff intends to file an amended complaint curing all deficiencies. As such, the court finds that the plaintiff's untimely opposition constitutes a statement of non-opposition to plaintiff's motion.

imposed upon the exercise of the congressional taxing and spending power. *Id.*

Plaintiff fails on both counts here. First, as the court stated in its prior order, plaintiff nowhere alleges any type of qualifying "legislative enactment" or congressional act. Plaintiff alleges only that the Understanding Evolution website was funded in part by a $523,261 grant from the National Science Foundation ("NSF"), a federal entity. *See* Complaint at ¶¶ 14, 18. Plaintiff does not allege that the grant resulted from any type of direct congressional action. Nor could she, since as the federal defendants' supporting declaration makes clear, the NSF grant was administered by NSF personnel in response to a solicitation process that was independent of any congressional action, and which has no direct link to the general appropriations that Congress makes to the various NSF directorates. *See* Declaration of David Campbell, Ph.D. ("Campbell Decl."), ¶ 8. In sum, plaintiff's allegations amount to no more than a complaint against the NSF's administrative decision to partially fund the Understanding Evolution website, and not – as required – to a complaint against direct congressional action under the taxing and spending clause.

Second, the "nexus" between plaintiff's taxpayer status and the nature of the alleged constitutional infringement is missing. As the federal defendants point out in their opening brief, plaintiff does not allege any congressional involvement in the NSF's

decision to provide partial funding for the Understanding Evolution website, or that the NSF merely acts as a vehicle to carry out Congress' orders and directives. *See* Opening Br. at 11:9-13.

As the court stated in its prior order, these facts beg the same result as the holding in *Fordyce v. Frohnmayer,* 763 F. Supp. 654 (D. D.C. 1991). In *Fordyce,* the court rejected plaintiff's federal taxpayer standing claim because plaintiff alleged only that a grant and sponsorship from the National Endowment for the Arts violated the Establishment Clause. The court specifically found that the required "nexus" for federal taxpayer standing was missing because plaintiff was not alleging direct congressional involvement in the NEA's decision to partially fund the exhibition in question, and plaintiff's allegations amounted to no more than a challenge to a decision made solely by an agency of an executive branch. *See* 763 F. Supp. at 657.

Accordingly, as it held with respect to the state defendants, the court holds that plaintiff has failed to allege federal taxpayer standing, and plaintiff's complaint cannot be supported on this ground.

2. Injury In Fact Standing

Article III standing requires that plaintiff plead a concrete "injury in fact" – i.e., some actual or threatened injury as a result of the purportedly illegal conduct of defendant. *See Valley Forge Christian College v. Am. United for Separation of Church &*

State, 454 U.S. 464, 472 (1982). The federal defendants argue that plaintiff's allegations constitute no more than the generalized grievances of a mere "interested bystander," and that under *Valley Forge,* standing is therefore lacking.

The federal defendants are correct. In *Valley Forge,* plaintiffs challenged a congressional act that allowed for the transfer of used government property to non-profit, tax-exempt educational institutions, including religious based institutions. The Supreme Court used the case to set forth an exhaustive discussion on standing requirements in the Establishment Clause context, and specifically addressed the "injury in fact" requirement. In determining that no standing existed where plaintiffs alleged "the deprivation of the fair and constitutional use of their tax dollar," the *Valley Forge* court reiterated its prohibition on standing claims that are predicated on "the right, possessed by every citizen, to require that the government be administered according to law . . . ". *See* 454 U.S. at 482-83. The court then went on to state: "Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing . . . even though the disagreement is phrased in constitutional terms." *See id.* at 485-86.

The court simultaneously reiterated that standing may nonetheless be based on noneconomic injury. *Id.*

Here, as the court stated in its prior order on the state defendants' motion to dismiss, plaintiff's allegations that she was "offended" by the website at issue and made to feel like an "outsider," fall directly within *Valley Forge*'s prohibition on standing where a plaintiff alleges only a "psychological consequence" produced "by observation of conduct with which one disagrees." *See* Complaint at ¶ 26. As such, plaintiff's allegations state only a generalized grievance against defendants, and are insufficient to confer injury in fact.

The court also finds that no injury in fact standing is present for all the reasons set forth in its prior order of March 13, 2006, and it hereby incorporates that order by reference.

Accordingly, in view of the fact that each of plaintiff's arguments in favor of standing fails, the court GRANTS the federal defendants' motion to dismiss plaintiff's complaint on the grounds that plaintiff lacks standing.

C. Establishment Clause Claim

As the court indicated in its prior order, in view of its finding that plaintiff lacks standing, the court need not, and does not, reach the merits of the Establishment Clause claim.

D. Conclusion

For the above reasons, the court GRANTS the federal defendants' motion to dismiss, with prejudice, for lack of plaintiff's standing. The court notes that plaintiff has essentially had three opportunities – first with the state defendants, then in a later filed administrative motion requesting clarification of the court's prior order, and now in opposition to the federal defendants' motion – to articulate which additional facts she would or could add to her complaint in order to bolster her standing arguments. Yet all that plaintiff has articulated, as set forth most concretely in plaintiff's administrative motion, are the addition of two allegations stating (1) that defendants' website is aimed at the general public; and (2) that defendants have "expressly invited members of the general public to visit and use the website." *See* Motion for Admin. Relief Regarding Clarification of Court's March 13, 2006 Order at 2:9-10. As the court sets forth in its Order on Administrative Motion and Granting Clarification (filed concurrently herewith), these proposed allegations do *not* support federal taxpayer standing. Therefore, any proposed amendment would be futile, and the court's dismissal is with prejudice.

IT IS SO ORDERED.

Dated: March 20, 2006

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JEANNE E. CALDWELL,

Plaintiff,

v.

ROY L. CALDWELL, PH.D., in his official capacity as Director of the University Of California Museum Of Paleontology; DAVID LINDBERG, in his official capacity as Chair of the Integrative Biology Department of the University of California-Berkeley; MICHAEL D. PIBURN, in his official capacity as Program Director for the National Science Foundation.

Defendants.

CASE NO. C05-04166

COMPLAINT: CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF AND NOMINAL DAMAGES FOR VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

[42 U.S.C. § 1983]

[Demand for Jury Trial]

COMPLAINT

(Filed Oct. 14, 2005)

* * *

EXHIBIT 2

Misconception: "Evolution and religion are incompatible."

Response: Religion and science (evolution) are very different things. In science (as in science class), only natural causes are used to explain natural phenomena, while religion deals with beliefs that are beyond the natural world.

The misconception that one has to choose between science and religion is divisive. Most Christian and Jewish religious groups have no conflict with the theory of evolution or other scientific findings. In fact, many religious people, including theologians, feel that a deeper understanding of nature actually enriches their faith. Moreover, in the scientific community there are thousands of scientists who are devoutly religious and also accept evolution.

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No. 08-858

Supreme Court, U.S.
FILED
FEB 9 - 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

JEANNE E. CALDWELL,

Petitioner,

v.

ROY L. CALDWELL, in his official capacity as Director of the University of California Museum of Paleontology; DAVID LINDBERG, in his official capacity as Chair of the Integrative Biology Department of the University of California-Berkeley; MICHAEL D. PIBURN, in his official capacity as Program Director for the National Science Foundation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. CARROLL*
(Bar No. 118106)
SCHIFF HARDIN LLP
One Market,
Spear Street Tower
Thirty-Second Floor
San Francisco, CA 94105
Telephone: (415) 901-8700
Facsimile: (415) 901-8701

**Counsel of Record*

CHARLES F. ROBINSON
(Bar No. 113197)
CHRISTOPHER M. PATTI
(Bar No. 118283)
UNIVERSITY OF CALIFORNIA
OFFICE OF GENERAL COUNSEL
1111 Franklin Street,
8th Floor
Oakland, CA 94607-5200
Telephone: (510) 987-9800
Facsimile: (510) 987-9757

Attorneys for Respondents
Roy L. Caldwell and David Lindberg

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED

Respondent submits that the following question more accurately reflects the issue presented in the petition for a writ of certiorari.

Does an injury in fact sufficient to confer standing under Article III of the United States Constitution arise from a plaintiff's offense at references to religion on one page of an extensive government-run internet website where the references resulted in, at most, a *de minimis* impairment in the plaintiff's use of the website and do not otherwise affect the plaintiff?

PARTIES TO THE PROCEEDINGS

The petitioner is Jeanne E. Caldwell.

The state respondents are Roy L. Caldwell, Director of the University of California's Museum of Paleontology, and David Lindberg, Chair of the Integrative Biology Department at the University of California's Berkeley campus, each of whom are sued in their official capacities. For simplicity, these respondents will be referred to as "the University of California," or "UC."

The federal respondent is David Campbell, sued in his official capacity as Program Director for the National Science Foundation. The federal respondent will be referred to as "NSF."

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OPINIONS BELOW

The opinion of the district court granting the state respondents' motion to dismiss is not reported. It is set forth in the Appendix. (Pet. App. 18-37.) The opinion of the district court granting the federal respondent's motion to dismiss is reported at 420 F.Supp.2d 1102 (N.D. Cal. 2006). (Pet. App. 38-50.) The Ninth Circuit's opinion affirming each of these orders is reported at 545 F.3d 1126 (2008).

INTRODUCTION

The petition for certiorari does not raise any question that warrants review by this Court. The Ninth Circuit's October 3, 2008 Opinion ("Opinion") does not warrant this Court's consideration because it does not conflict with any decision by this Court, and petitioner does not allege that it creates a conflict with any federal court of appeals or state court of last resort. Petitioner argues that intervention by this Court is needed in order to fashion a new, more expansive test for determining whether an internet user who takes offense at religious references appearing on a government-run website has suffered an injury in fact sufficient to satisfy Article III standing requirements in Establishment Clause cases. The issue is a novel one. Indeed, petitioner fails to cite any other case, in any circuit, that has ever addressed it, despite more than a decade of explosive growth in the use of the internet. The petition improperly and

prematurely calls upon this Court to act now, despite this absence of any case law suggesting frequent occurrence or divisive treatment of this issue in the federal courts. Moreover, to the extent the issue of internet standing arises again in future Establishment Clause cases, it is readily and appropriately addressed through existing standing principles, as demonstrated by the Ninth Circuit's sound decision here.

STATEMENT OF THE CASE

In an effort to furnish primary and secondary school science teachers with a dynamic and comprehensive resource for teaching the science of evolution and the history of evolutionary thought, the University of California's Museum of Paleontology sought and received a federal grant to develop and maintain an education website known as "Understanding Evolution" ("UE") (http://evolution.berkeley.edu). The UE website, which consists of some 840 web pages addressing a myriad of topics relating to evolution, is accessible by teachers as well as members of the general public through the internet.[1] Visitors to the

[1] As the site itself states: "Understanding Evolution is a non-commercial, education website, teaching the science and history of evolutionary biology. This site is here to help you understand what evolution is, how it works, how it factors into your life, how research in evolutionary biology is performed,

(Continued on following page)

website may navigate through numerous subsites addressing topics ranging from detailed explanations of the mechanisms of evolution and the history of life on Earth, to scientific evidence relating to evolution, to the history of ideas, research, and contributors to the study of evolution. Petitioner has accessed the Understanding Evolution website through the internet. She contends that her review of one of the site's web pages caused her to take offense at content which she perceived to be in violation of the Establishment Clause, and which made her feel like an outsider. She asserts that these feelings amount to a cognizable injury in fact, sufficient to confer Article III standing to pursue her Establishment Clause challenge to the UE website. The district court disagreed, dismissing the complaint for lack of standing. The Ninth Circuit affirmed.

The focus of petitioner's complaint is a web page titled "Misconception: 'Evolution and Religion are Incompatible.'" This web page appears within the "Misconceptions" subsite which is part of "Understanding Evolution for Teachers," one of several subsites comprising the UE website. The teacher subsite sets out a broad range of resources for teaching evolution at the primary and secondary school levels, including extensive information regarding the subject of evolution, grade-appropriate lesson plans,

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and how ideas in this area have changed over time." (http://evolution.berkeley.edu.)

classroom strategies, sample quizzes, and more. The "Misconceptions" subsite includes five separate web pages, each describing a different misconception concerning evolution, along with suggestions designed to assist teachers in addressing the misconception in the classroom. The web page at issue here addresses the misconception that religion and evolution are incompatible.[2] It explains that the perceived incompatibility arises out of a misunderstanding of the separate functions of science and religion, and suggests that it is not always necessary to choose between one or the other.[3] The page illustrates this concept with a drawing depicting a smiling scientist in a lab coat holding a fossil skull and shaking hands with a smiling cleric who is holding a book marked

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[2] The page is titled "Misconception: 'Evolution and Religion are Incompatible,'" and is located at http://evolution.berkeley.edu/evosite/misconceps/IVAandreligion.shtml. An earlier version of the page is attached as Exhibit 2 to the Complaint. (Pet. App. 52.) Petitioner's unsupported assertion that the referenced text was changed "in response to this lawsuit" is inaccurate. (Pet. 5.)

[3] In short, the UE pages about which plaintiff complains provide a ***description*** of certain religious views about evolution, acknowledge the existence of religious objections to the theory and describe the positions of other religions that accept it. The "misconceptions" page counters the misconception that one always has to choose between science and religion and provides as a supporting reference, a hyperlink to a collection of statements by religious groups whose beliefs do not conflict with evolution. The page thus ***educates*** about the religious debate over evolution.

with a small cross.[4] The page includes a link allowing the reader to navigate to a separate web page titled "Voices for Evolution." The linked page, which is not part of the UE site, contains a number of statements from religious organizations supportive of evolution.

On October 14, 2005, petitioner filed a lawsuit against UC and NSF.[5] The complaint avers that the material on the UE site explaining that religion and evolution are not incompatible are "doctrinal statements," which are endorsed by UC, and which UC uses to "proselytize" public school students and the general public in violation of the Establishment Clause. Petitioner alleges that, as a parent of school age children and as a citizen who participates in school board meetings, debates, and elections, she makes use of the UE website to learn how UC recommends that public science teachers teach evolution

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[4] Petitioner's focus on this single page, located within one of many subsites which themselves form a discrete section of the 840 pages comprising the UE website, belies her repeated attempts to magnify and distort its significance within the context of the larger site. Specifically, petitioner's assertion that this page was in furtherance of the University of California's "primary goal" of combating a minority of Christian fundamentalists has no support in the record, or otherwise. (Pet. 4.)

[5] The petition's assertion that "[b]ecause Caldwell cannot use the entire website unreservedly, she filed suit in federal court . . . " is misleading. (Pet. 9.) In fact, the complaint fails to allege any diminution of any kind in petitioner's use of the UE site.

to K-12 students in California.[6] Contending that she is offended and made to feel like an outsider by the site's content addressing the compatibility of religion and evolution, petitioner sought an injunction restraining publication of the UE website and a judgment declaring that inclusion of this content violates the Establishment Clause.[7] On March 13, 2006, the district court granted UC's motion to dismiss the complaint for lack of standing, concluding that petitioner had done no more than to allege a "generalized grievance," insufficient to establish the injury in fact required for standing under *Valley Forge Coll. v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982). (Pet. App. 18-37.) The district court subsequently dismissed the claims against NSF on this and other grounds. (Pet. App. 38-50.)

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[6] The petition includes numerous factual assertions regarding petitioner which are nowhere to be found in the complaint, including the assertion that petitioner is "a biblical literalist," who "believes that the biblical account of origins is incompatible with Darwin's evolutionary account of origins;" and that she "is of the opinion that children in the public schools should not be taught that the Christian account of origin is compatible with Darwin's evolutionary account of evolution." (Pet. 7.)

[7] The petition's reference to petitioner's "discovery" that "the primary purpose of the entire Understanding Evolution website was to combat the 'influence of . . . Christian fundamentalists such as herself' " refers to new facts that do not appear in the complaint or anywhere else in the record, and which completely misrepresents the express and apparent educational purpose of the UE site. (Pet. 8-9.)

Petitioner appealed to the Ninth Circuit court of appeals. On October 3, 2008, the court of appeals issued a decision affirming the district court's judgment of dismissal of the complaint in its entirety. (Pet. App. 1-17.) The Ninth Circuit held that the harm asserted by petitioner to her interest in being informed about the teaching of evolutionary theory is too generalized and remote to confer standing. The court rejected petitioner's attempt to analogize her case with Ninth Circuit authorities addressing Establishment Clause challenges to the erection and maintenance of crosses on public lands. *See Buono v. Norton,* 371 F.3d 543, 547 (9th Cir. 2004); *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617, 619 (9th Cir. 1996); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993). The court held that petitioner's asserted interest in the content of the UE website is not sufficiently direct or differentiated to confer standing. It observed that, unlike the plaintiffs in *School District of Abington v. Schempp*, 374 U.S. 203 (1963), which acknowledged that parents had standing to challenge Bible readings in the classrooms attended by their children, petitioner made no claim that her children's teachers had incorporated any of the challenged content from the UE site into their curriculum or had otherwise exposed petitioner's children to it in the classroom. Rather, petitioner's objections to the content on the UE site

were in the nature of an abstract, generalized grievance, insufficient to sustain her standing to sue.[8]

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT'S ANALYSIS INVOLVES THE FACT-BOUND APPLICATION OF SETTLED LAW AND DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT.

The petition identifies three reasons for review: 1) this is a case of first impression; 2) cases that implicate the Establishment Clause on government owned websites will occur in the future; and 3) formulation of a test is in the public interest. Each of these reasons arises out of the same flawed premise which presumes that, because there is bound to be a surge in future litigation alleging constitutional violations arising out of government websites, and because there is currently no "workable test" for determining standing to bring such litigation, this Court must act now to fashion such a test. Petitioner is wrong on both counts. There is scant evidence

[8] In a concurring opinion, Judge Fletcher elaborated on this rationale, concluding that petitioner's asserted injury is too *de minimis* to confer standing in view of, among other factors, the ease with which petitioner could avoid the offending web page while freely accessing the rest of the UE site, and the absence of any allegation that she would be subject to "frequent and regular" exposure to the offending page.

supporting the predicted surge in claims challenging internet-based content; indeed, the evidence is to the contrary. Moreover, the courts' examination of the standing issues presented in any cases that do arise is adequately guided by existing precedents and does not require formulation of a new standing test aimed at users of the internet.

First, in asserting this is a case of first impression, petitioner readily acknowledges there is no circuit conflict which requires resolution by this Court, and so concedes the absence of the criterion that most frequently results in the granting of certiorari. *See* Sup.Ct. R. 10(a); Robert L. Stern, et al., Supreme Court Practice 225-32 (8th ed. 2002). *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (Certiorari denied where the issue requires further study in the lower courts before it is addressed by this Court).

Next, petitioner asserts that – despite the lack of such litigation to date – the future will bring a spate of cases alleging web-based Establishment Clause violations in sufficient numbers to justify this Court acting now to fashion a new, "workable" standing test for such cases. Petitioner's prediction lacks any empirical support, and is undercut by her own concession that not a single reported decision has arisen in the decade of explosive growth in the internet which preceded the instant case – or (excepting the district court and Ninth Circuit decisions here) in the three years which have elapsed since this case was filed. This prediction is further undermined by

petitioner's failure to cite any case addressing an Establishment Clause challenge aimed at "older forms of communications" such as government-produced books or pamphlets. (Pet. 9, 14-15.) For well over 100 years, the government has had the capacity to "display" photographs of crosses, the Ten Commandments or other religious symbols in books or other printed materials – and has presumably done so innumerable times. Petitioner fails to explain why publication of such material on the internet now is likely to spawn a multitude of Establishment Clause challenges, when publication of similar material in traditional media throughout the past century has not. In short, the issue framed in the petition is novel and is likely to remain so. The infrequency with which that issue arises makes quite clear that it is of insufficient legal or practical importance to justify review by this Court. "[A]cademic or episodic debate" does not warrant the granting of certiorari. *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74 (1955).

Even if one assumes that a surge in Establishment Clause challenges to web-based content is to occur in the future, petitioner utterly fails to explain how this justifies review of the court of appeal's decision at this time, before other courts have addressed the standing issue in this context. As discussed below, the Ninth Circuit's analysis is sound and consistent with the long-standing precedents of this Court. There is no reason to assume that different circuits would reach differing outcomes on facts similar to those presented here. In the unlikely event

conflicting circuit court decisions do arise at some future point – and those differences are attributable to something other than the fact-bound application of settled standing principles – there could conceivably be a basis for seeking resolution of the conflict by means of review by this Court. Until such time, the lower courts – to the extent they are presented with the issue at all – can and should be given the opportunity to develop further precedents addressing the many and varied factual contexts within which Establishment Clause challenges to web-based content may occur.

As a third reason justifying review, petitioner broadly refers to "the public interest" in formulating a test to determine how Article III standing applies to a government website. Here, petitioner relies upon a false dichotomy, suggesting that the public interest requires this Court to develop a special standing rule for challenges to internet content "which avoids the two extremes in which either the whole world has standing or no one has standing." (Pet. 17.) First, no such rule is required. As amply illustrated by the court of appeals' decision here, resolution of standing issues in such cases may proceed by application of long-established precedents to the specific factual record presented. The court of appeals has not foreclosed the possibility that an internet user may, under other circumstances not alleged here, demonstrate an injury in fact sufficient to sustain standing. To the contrary, it explicitly acknowledged that possibility. (Pet. App. 16-17 (Fletcher, J., concurring).)

Moreover, as noted, petitioner's inflated characterizations as to the importance of fashioning a new and broader rule designed to secure standing for internet users who wish to challenge the constitutionality of web-based content are belied by the complete dearth of existing case law addressing the issue.[9] To the extent such cases arise in the future, existing standing principals as announced by this Court in *Valley Forge* and elsewhere and as applied by the court of appeals here, are more than adequate to ensure achievement of the standing doctrine's core aim: ensuring the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends

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[9] The stunning breadth of petitioner's proposed rule would essentially render *Valley Forge* a nullity by permitting unfettered access to the federal courts by any internet user who takes offense at a perceived violation of the Establishment Clause. Petitioner proposes a test in which standing is conferred upon ***any*** user of a website who uses it for its intended purpose and who is offended by religious content on the site which purportedly runs afoul of the Establishment Clause. No consideration whatever is given to the user's interest or purpose in accessing the site, to the necessity (or lack thereof) for repeated viewings of the offensive material, or to the degree of diminution in the users' ability to use of the site. Rather where (as would be the case in most government-sponsored websites) the site is intended for viewing by the general public, ***any*** member of the public using the site who takes offense at the religious content would have standing. Petitioner's proposed test thus embodies the very essence of a "generalized grievance:" one that could be shared by anyone, anywhere in the country, at any time.

for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204 (1962).

II.

THE NINTH CIRCUIT CORRECTLY APPLIED CLEARLY ESTABLISHED PRINCIPLES IN HOLDING THAT PLAINTIFF LACKS STANDING TO PURSUE HER CLAIM UNDER THE ESTABLISHMENT CLAUSE.

Even if a mere plea for error correction could justify granting certiorari (and it cannot) the petition fails because the court of appeal's decision was plainly correct.[10] The court of appeals evaluated petitioner's claimed injury in fact under long-standing precedents from this Court and within the Ninth Circuit, and reached the sound conclusion that she had alleged nothing more than an abstract, generalized grievance, untethered to the particularized harm required to establish Article III standing.

To establish a "case-or-controversy" within the meaning of Article III, a plaintiff must show an "injury in fact," a causal connection between the injury and defendant's conduct or omissions, and a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504

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[10] "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rules of the Supreme Court of the United States, Rule 10.

U.S. 555, 560-561 (1992); *Valley Forge Coll. v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982) (plaintiff's showing of a personalized injury in fact is an "irreducible minimum" requirement of Article III). The asserted injury must be both "concrete" and "particularized." *Lujan*, 504 U.S. at 560. To suffer a "particularized" injury means "that the injury must affect the plaintiff in a personal and individual way." *Lujan,* 504 U.S. at 560 & n.1; *see also United States v. SCRAP,* 412 U.S. 669, 689 (1973). The requirement of a particularized injury is essential to ensuring the proper allocation of power between our three branches of government. "Without such limitations," whether grounded in Article III or prudential considerations, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth v. Seldin,* 422 U.S. 490, 500 (1975).[11] The gist of the inquiry is whether the complaining party has "[a]lleged such a personal stake in the outcome of the

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[11] This Court elaborated on this rationale in a case decided shortly before *Warth*: "To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 222 (1974).

controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v Carr*, 369 U.S. 186, 204 (1962).

Where, as here, the alleged harm to the individual consists of nothing more than the offense taken at a perceived violation of the Constitution, the "irreducible requirements" for standing are not met. This Court settled this question long ago, ruling that plaintiffs who sought to raise an Establishment Clause challenge to the transfer of federal property located in another state lacked standing, because they had failed to identify any injury beyond "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . even though the disagreement is phrased in constitutional terms." *Valley Forge Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 485-486 (1982); *accord Allen v. Wright*, 468 U.S. 737, 755-756 (1984) ("abstract stigmatic injury" insufficient by itself to create Article III injury in fact); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n.13 (1974) ("abstract injury in nonobservance of the Constitution" insufficient to confer Article III injury). The Washington D.C.-based plaintiffs in *Valley Forge* learned through a news release that surplus government property had been transferred to a Christian college located in Pennsylvania, and subsequently challenged the transfer on Establishment Clause grounds. In holding that

plaintiffs had failed to establish standing by means of an injury in fact, this Court observed that it is not enough for a party to claim that the Establishment Clause has been violated; "[s]uch claims amount to little more than attempts to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *Id.* at 483 (internal quotations and citations omitted). Since *Valley Forge*, it has been settled law that an individual who invokes Article III standing to pursue an Establishment Clause claim must identify an injury in fact which arises ***as a consequence*** of the alleged constitutional error, other than the psychological consequence produced by observation of the perceived unconstitutional conduct.

In an effort to meet this burden, petitioner has sought to draw an analogy to a line of cases addressing the display of religious symbols on government property, principally the Ninth Circuit's decision in *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004). There, the Ninth Circuit held that a regular visitor to a federal Preserve in Arizona had standing to bring an Establishment Clause challenge to the maintenance of a Latin cross monument within the Preserve, holding that the plaintiff's asserted inability to freely use the public land in the vicinity of the cross constitutes a cognizable injury in fact. Petitioner argues that her asserted inability to "unreservedly" use the UE website without coming into direct contact with the challenged content also gives rise to a cognizable

injury, beyond the bare "psychological harm" alleged in *Valley Forge*.

The Ninth Circuit disposed of these arguments by means of a sound and straightforward application of existing precedents. In so doing, the court of appeals made clear that it was not fashioning a novel rule of "internet standing" to be applied in any and all cases raising Establishment Clause challenges to web-based content. Rather, the court considered the unique factual circumstances asserted by petitioner, including her individualized motives and interests in accessing the UE website, as well as the specific characteristics of the UE site itself, including its scope, purpose, and the context within which the challenged content is found.

Referring to the factual record before it, the court observed that petitioner's connection to the challenged content on the UE site was not as removed as the plaintiffs' in *Valley Forge*, but was more tenuous than Buono's encounter with the permanently installed cross maintained on the Preserve. (Pet. App. 12-13.) The court also distinguished petitioner's circumstances from those presented in *Vasquez v. Los Angeles County*, 487 F.3d 1246 (9th Cir. 2007), where it had concluded that a county employee forced to have daily contact with a county seal which he regarded as an offensive anti-religious symbol had standing to challenge the seal under the Establishment Clause. Unlike petitioner's remote and limited use of the UE site here, the plaintiff in *Vasquez* had alleged membership in the community where the seal

was pervasively on display, so that he was forced into frequent, unwelcome, and direct contact with it. Thus, the Ninth Circuit concluded that because petitioner's connection to the challenged content on the UE site was more attenuated than in *Buono*, and not as concrete or forced as in *Vasquez*, she could not rely on those authorities in demonstrating that her concerns amounted to anything other than an "abstract objection" to that content. (Pet. App. 12-13.)[12]

Judge Fletcher elaborated on this rationale in her concurring opinion, where she noted petitioner's failure to allege that she "had any reason to visit the offending web page more than once." (Pet. App. 16.)[13]

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[12] The court of appeal also contrasted the abstract nature of petitioner's objection with the parental objections raised in *School District of Abington v. Schempp*, 374 U.S. 203, 224 n.9 (1963). (Pet. App. 13-14; 14-15.) There, parents of children enrolled in public school objected to a Bible reading in the classroom that was mandated by state law. Unlike the *Schempp* plaintiffs, who were directly affected by the classroom readings, petitioner did not allege that the challenged content from the UE site was ever conveyed to her children in the classroom. Thus, as the concurring opinion concluded, "there is no allegation that Caldwell's children or Caldwell herself were 'directly affected' by the offensive content of the UE website." (Pet. App. 14-15 (Fletcher, J. concurring).)

[13] To the contrary, petitioner's stated reason for viewing the UE website – to learn about how the University of California recommends that public school science teachers teach evolution – belies any need for multiple or frequent viewings of the challenged content. Petitioner's failure to allege any such repeated or ongoing exposure to the offending display contrasts with the post-*Valley Forge* case law, where courts routinely cite ongoing or frequent exposure to the challenged display in

(Continued on following page)

Judge Fletcher further observed that the offense taken by petitioner in viewing the challenged "misconceptions" web page did not prevent her from freely using the rest of the 840 web pages comprising the UE site, "each of which can be viewed without having first viewed the offending page." (Pet. App. 16.) Indeed, the challenged "misconceptions" page represents a tiny fraction of the information available on the UE site, and is in no way essential or integral to the site's stated purpose in "teaching the science and history of evolutionary biology." (http://evolution.berkeley.edu.) As observed in the concurring opinion, because petitioner had no need for multiple viewings of the challenged "misconceptions" web page in order to learn about UC's recommendations on how evolution is taught, and because the challenged content represents an extremely limited portion of the site's offerings and is easily avoided, any diminution in petitioner's use of the UE site is *de minimis* and so cannot fulfill the purpose of the actual injury requirement in ensuring that "there is a specific

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identifying the requisite injury in fact. *See, e.g., Buono,* 371 F.3d at 546 (former employee of federal Preserve where cross was displayed "now lives in Oregon" but "visit[s] the Preserve two to four times a year on average", and intends to relocate to Southern California or Arizona, and "make more frequent trips to the Preserve"); *Foremaster v. City of St. George*, 882 F.2d 1485, 1491 (10th Cir. 1989) (injury arising out of viewing religious logo in City Hall "on a daily basis"); *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987) (finding city residents had standing to challenge city seal containing the word "Christianity" where they "regularly receive" correspondence bearing the seal).

controversy before the court and that there is an advocate with sufficient personal concern to effectively litigate the matter." (Pet. App. 16-17 (Fletcher, J., concurring); (quoting *Vasquez v. Los Angeles County*, 487 F.3d at 1250).)

The Ninth Circuit's fact-based analysis lays to rest petitioner's current assertion that its ruling "would render all government websites immune from legal challenge by citizens." (Pet. 12.)[14] Indeed, the concurring opinion makes this point explicitly, observing that " . . . in certain cases the inability to access a government run website due to allegedly unconstitutional content may well confer standing." (Pet. App. 16-17 (Fletcher, J., concurring).) Future Establishment Clause cases challenging web-based content, if and when they are filed, may present different facts and circumstances sufficient to satisfy the injury in fact requirement. Petitioner's contrary assertions notwithstanding, nothing in the Ninth Circuit's decision forecloses that possibility.

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[14] Even if this assertion were true, it does not mean that the Ninth Circuit erred in its conclusion that petitioner lacked standing here. "Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974).

CONCLUSION

There is no compelling reason for this Court to grant certiorari. Petitioner makes no serious attempt to argue that any of the reasons set forth in Rule 10 exists. Instead, she unsuccessfully seeks to challenge the Ninth Circuit's sound application of firmly established standing principles to the facts presented. Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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WILLIAM J. CARROLL
(Bar No. 118106)
SCHIFF HARDIN LLP
One Market,
Spear Street Tower
Thirty-Second Floor
San Francisco, CA 94105
(415) 901-8700

Attorneys for Respondents
Roy L. Caldwell and
David Lindberg

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In The
Supreme Court of the United States

JEANNE E. CALDWELL,

Petitioner,

v.

ROY L. CALDWELL, PH.D., in his official capacity as Director of the University Of California Museum Of Paleontology; DAVID LINDBERG, in his official capacity as Chair of the Integrative Biology Department of the University of California-Berkeley; and MICHAEL D. PIBURN, in his official capacity as Program Director for the National Science Foundation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

KEVIN T. SNIDER
Counsel of Record
MATTHEW B. MCREYNOLDS
PACIFIC JUSTICE INSTITUTE
Post Office Box 276600
9851 Horn Road, Suite 115
Sacramento, California 95827
(916) 857-6900 (Telephone)
(916) 857-6902 (Facsimile)

LARRY J. CALDWELL
CALDWELL LAW FIRM
1380 Lead Hill Blvd, Suite 106
Roseville, California 95661
(916) 677-4254 (Telephone)
(916) 671-8322 (Facsimile)

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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U.S. Const. art. III 3, 6, 7

U.S. Const. amend. I ..... *passim*

Petitioner, Jeanne E. Caldwell ("Jeanne Caldwell"), submits the following Reply in support of her Petition for Writ of Certiorari.

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

In their Opposition, Respondents Roy L. Caldwell and David Lindberg ("the University"), raise two new points that are closely related. First, the University echoes Judge Fletcher's concurring opinion in calling for an exception to the normal standing rules for citizens who experience a so-called *de minimis* interference with their right to unreservedly use a government resource without encountering an unwanted and unwelcome governmental religious statement in violation of the Establishment Clause. As explained below, this proposition represents a radical departure from this Court's jurisprudence on standing to pursue Establishment Clause violations, which should be rejected. Second, the University makes a factual statement in support of the contention that its interference with Jeanne Caldwell's use of *Understanding Evolution* is *de minimis* that is inaccurate. As explained below, the true facts, as reflected in the Record on Appeal, show that the *Misconception: Evolution and Religion Are Incompatible* webpage is an integral part of *Understanding Evolution* that appears to have been designed to carry out an express purpose of the University in creating *Understanding*

Evolution – to respond to, and hopefully diminish, the influence of citizens such as Jeanne Caldwell in the religious debate over evolution and how it should be taught in our public schools. With this purpose in mind, it is to be expected that Jeanne Caldwell's direct exposure to statements by the University on the *Misconception: Evolution and Religion Are Incompatible* webpage that criticize her own religious belief and endorse opposing religious beliefs would cause her injury in fact.

II.

THE PROPOSED *DE MINIMIS* IMPAIRMENT EXCEPTION ADVOCATED BY THE UNIVERSITY IS A SIGNIFICANT DEPARTURE FROM ARTICLE III STANDING RULES

In its "Counterstatement of Question Presented," the University poses a novel exception from standing to pursue Establishment Clause claims: A *de minimis* impairment in the use of a government website is insufficient injury to confer standing. (Opp., page i). The University provides minimal analysis for its proposed exception, other than a citation to Judge Fletcher's description of Jeanne Caldwell's injury as *de minimis* in her concurring opinion. (Opp. 8, fn. 8; Opinion at 14093). The University's proposed *de minimis* impairment exception appears to be based on the notion that a violation of the Establishment Clause that interferes with a citizen's ability to use only a portion of a government website is the equivalent of an "*abstract, generalized grievance.*"

(Opp. 8, fn. 8). On this basis, it is argued that such a citizen has no Article III standing to challenge such an Establishment Clause violation.

The premise is flawed, for this court has never equated an *abstract, generalized grievance* with a *de minimis* constitutional injury. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 470 (1982); *Federal Election Commission v. Akins*, 524 U.S. 11 (1998); *Secretary of State of Maryland v. Munson*, 476 U.S. 947 (1984); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

There is good reason for this. Whether a toe is stubbed or a leg is broken, both are actual injuries, though they are different in terms of severity. And so it is with Establishment Clause violations. "There are no *de minimis* violations of the Constitution – no constitutional harms that are so slight that the courts are obliged to ignore them." *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 36-37 (2004) (O'Connor, J., concurring in judgment).

An *abstract, generalized grievance* occurs when the plaintiff has no actual connection with the alleged violation. Such was the case in *Valley Forge,* wherein the complainants had never been to the property in question, but had merely learned of the matter from a news release. *Id.*, at 469. In contrast, Jeanne Caldwell has actually used *Understanding Evolution* for its intended purpose, and she has come into direct

contact with the governmental religious statement that violates the Establishment Clause.

This Court should grant Caldwell's Petition for Writ of Certiorari to put to rest any notion that *de minimis* violations of the Establishment Clause are acceptable, and to put to rest the University's corollary proposition that a citizen's direct exposure to a *de minimis* violation of the Establishment Clause does not result in injury in fact sufficient to support standing to bring a claim based on such Establishment Clause violations.

III.

THE *MISCONCEPTION: EVOLUTION AND RELIGION ARE INCOMPATIBLE* PAGE IS AN INTEGRAL COMPONENT OF THE WEBSITE

A key contention of the Opposition filed by the University is that the *Misconception: Evolution and Religion Are Incompatible* webpage, at the heart of this dispute, is purportedly not a very significant component of the *Understanding Evolution* website. (See, e.g., Opp. 5, fn. 5). This contention is offered as the primary evidence in support of the University's *de minimis* impairment argument discussed above. In support of this contention, the University makes the following statement in the Opposition:

> The petition's reference to petitioner's "discovery" that "the primary purpose of the entire Understanding Evolution website was to combat the 'influence of . . . Christian

> fundamentalists such as herself' refers to new facts that do not appear in the complaint or anywhere else in the record, and which completely misrepresents the express and apparent educational purpose of the UE site.

(Opp. 6, fn 7).

Jeanne Caldwell begs to differ. The record in this action includes the University's Grant Application submitted to the National Science Foundation to obtain most of the funding for *Understanding Evolution*. (Record on Appeal 227-239).[1]

The introductory section of the Grant Application entitled, "Need for the Project," references "[t]he influence of a minority of vocal Christian fundamentalists throughout the country on the development of curricula and the adoption of instructional materials has increased in recent decades" as one of the primary justifications for the *Understanding Evolution* website. (ROA 228). Clearly, a primary purpose of the University of California in creating *Understanding Evolution* was to respond to – and hopefully diminish the influence of – "a minority of vocal Christian fundamentalists" in the religious debate over evolution.

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[1] Petitioners believe that the misstatement by the University was not intentional and likely occurred because the federal co-respondent filed the Application in the District Court. In any event, this Court can order the record to verify the language recited by Petitioner. The facts in this case are not complex and, except for this oversight by the University, not in dispute.

The University's Grant Application also acknowledges that evolution is "the most controversial subject in science." (ROA 228).

In this context, it is also not surprising a citizen holding a religious belief the University deems to be *Christian fundamentalist* would feel like an outsider when reading the *Misconception: Evolution and Religion Are Incompatible* webpage. After all, the original version of the webpage described that religious belief as "divisive" (App. 52) and the revised version of the webpage describes that religious belief as *incorrect*. (Pet. 5). As a result, Jeanne Caldwell cannot use the government website unreservedly without encountering offensive and unwanted statements denigrating her own religious belief and endorsing contrary religious beliefs. Since the University of California's stated purpose for creating *Understanding Evolution* was to diminish the impact of *Christian fundamentalists*, it is to be expected that a citizen holding that religious viewpoint would suffer injury when using the webpage of *Understanding Evolution* that goes to the heart of the religious debate over evolution.

IV.

CONCLUSION

The University claims in its opposition that the issue of internet liability as it relates to the Establishment Clause is resolved by mere application of past Art. III precedent. (Opp. 13-20). But by

presenting its own novel approach to determining standing within the context of a government internet site, the University's opposition unwittingly demonstrates why granting the petition is appropriate. In sum, the parties are presenting two competing formulas for Art. III standing when an alleged Establishment Clause violation occurs on the internet. This is not surprising in that this is a case of first impression. As such, the petition for certiorari should be granted to resolve this important issue and thus give guidance to lower courts and other state actors.

Respectfully submitted,

KEVIN T. SNIDER
Counsel of Record
MATTHEW B. MCREYNOLDS
PACIFIC JUSTICE INSTITUTE
Post Office Box 276600
9851 Horn Road, Suite 115
Sacramento, California 95827
(916) 857-6900 (Telephone)
(916) 857-6902 (Facsimile)

LARRY J. CALDWELL
CALDWELL LAW FIRM
1380 Lead Hill Blvd, Suite 106
Roseville, California 95661
(916) 677-4254 (Telephone)
(916) 671-8322 (Facsimile)